NAVAL WAR COLLEGE

INTERNATIONAL LAW SITUATIONS

WITH

SOLUTIONS AND NOTES

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PREFACE.

The International Law Situations at the Naval War College during the summer course of 1902 were under the immediate direction of Mr. George Grafton Wilson, Professor in Brown University, whose name is already known to the service through previous papers prepared by him for the college.

As last year by Mr. Moore, this year the situations were set by Mr. Wilson, and tentative solutions offered by the committees into which the officers in attendance are divided for the college work. Throughout the several law periods during the summer there were general, and frequently long-continued, discussions of the solutions by the officers, making the subject a living one; the more so, that several of the situations were of late occurrence, which the officers concerned have sent to the college for consideration. It is hoped that so profitable a practice will be continued by the officers afloat.

F. E. Chadwick,
Captain, U. S. N., President.

Naval War College,
Newport, R. I., November 19, 1902.

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SITUATION I.

While a state of war exists between the United States and foreign state X, it is found that a submarine telegraphic cable owned by a neutral company and connecting hostile state X with neutral state Y is used for the transmission of dispatches hostile to the United States.

The United States naval officer in command of the fleet cruising near protests to neutral state Y against such use of the cable.

The authorities of state Y claim that they have no responsibility.

It is not possible for the United States vessel to interrupt the cable within the three-mile limit of hostile state X. The cable is, however, grappled beyond the three-mile limit in the high sea, and by order of the commanding officer is cut.

The neutral owners claim damages from the United States for injury to the cable and for interruption of service, alleging among other reasons in support of the claim that the act of the commanding officer in cutting the cable was contrary to Article V of the Naval War Code of the United States.

Was the action of the officer proper?

SOLUTION.

1. The action of the officer in protesting against the hostile use of the cable connecting enemy state X and neutral state Y was proper action. Such action is desirable whenever possible without undue risk, of which risk the officer himself must judge. This does not imply an obligation to give such official protest or responsibility in case such protest is not made.

2. The authorities of a neutral state may assume or decline to assume responsibility for a cable connecting the neutral with a belligerent state.

3. The cable service is to be considered, when hostile, in the category of unneutral service and the penalties should be determined accordingly.

4. The neutral owners have no ground for claim for damages for injury to the cable or for interruption to service.

5. The Naval War Code of the United States makes no provision for such a case, but practice and general principles justify the action of the officer in cutting the cable anywhere outside of neutral jurisdiction.

NOTES ON SITUATION I.

SUBMARINE CABLES IN TIME OF WAR.

The protest.—The propriety of the first act of the commanding officer in entering a protest against the use of the cable can be affirmed; the question of his obligation to do so must depend upon the policy of the United States and the urgency of cutting off the communication. It is sufficient to say that at the present time neither international law nor national policy makes such a protest obligatory.

The action of Brazil in 1898[1] and the occasional action of other neutral countries show a drift toward the assumption of governmental authority over such cable service as in time of war may involve violation of the strict neutrality of neutral territory. The development of this tendency to assume authority would give a basis for judgment of the obligation to give notification before cutting a cable.

The rule in regard to obligation might be stated as follows: In proportion as the neutral government assumes responsibility for the communication by cable between its territory and belligerent territory, in that proportion is it the obligation of the belligerent to notify the neutral (whenever possible without serious danger to the belligerent himself) that the belligerent proposes to interrupt freedom of communication by cable. The cable should then be used only under such restrictions as may be

[1] Neutrality Regulations, Brazil, April 29, 1898, Art. V: "It is prohibited citizens or aliens residing in Brazil to announce by telegraph the departure or near arrival of any ship, merchant or war, of the belligerents, or to give to them any orders, instructions, or warnings, with the purpose of prejudicing the enemy." (Proclamations and decrees during the war with Spain, p. 14.)

agreed upon by the belligerent and the neutral. In all such cases the action may lead to cutting in case the belligerent is not satisfied with the restrictions proposed, or to the sealing and absolute prohibition of the service in case the neutral is not satisfied with the conditions proposed.

The development of a policy of national responsible control is advocated as the best method for securing the end advocated by all, "the complete submission of the enemy at the earliest possible period with the least expenditure of life and property."[1] National control and guarantee of neutrality in time of war would be for the advantage of owners during war and for the world at large on return of peace, provided always a satisfactory means for assuring neutrality can be found.

The responsibility of state Y.—The general principles of jurisdiction or the right to exercise state authority undoubtedly carries with it the right to control cables so far as is necessary for the protection of state Y or the maintenance of its sovereignty, particularly so far as those cables are within the limits of the jurisdiction of the state.

From the relation of a state to a cable, state Y is doubtless at liberty to disclaim responsibility for a cable already constructed so far as its international relations are concerned. It may, however, as in the case of Brazil, by Article V of the proclamation of neutrality in 1898, prohibit the use of a cable or other means of telegraphic communication for the aid of either belligerent by a domestic regulation.[2] Brazil would thus assume a moral obligation to enforce its proclamation. This would not carry international responsibility, but merely shows that a state may assume of its own accord some supervision of its cable service. It is not, however, a violation of neutrality not to assume any control or responsibility for private lines.

It has been held, however, that the state does control absolutely the landing of cables upon its shores, and that it would therefore be a violation of neutrality to permit,

[1] Naval War Code of the United States.

[2] Proclamations and decrees during the war with Spain, p. 14.

during the continuance of the war, a new cable to be laid within its jurisdiction for military purposes which should connect its shores with one of the belligerents.[1]

Another phase of cable control is seen in the action of the company in sealing the cable at Hongkong to avoid all complications. This opens the question of responsible sealing as a means of avoiding injury to cable property, which in itself is of the greatest benefit to the world. If actually sealed by a responsible party the cable has nothing in its nature to render it necessarily confiscable. All that a belligerent wishes in regard to hostile cables is that they shall not be used at all or shall not be used for hostile purposes after the belligerent has once been in position to prevent such use. Outside of neutral jurisdiction a belligerent might of course with propriety cut a cable connecting a blockaded port of the enemy.

There is equally no question that the belligerent has no right to demand that all cables connecting the enemy state with neutrals shall be sealed or otherwise controlled, provided he is in no position to enforce his demands by himself interrupting the cable.

The grounds for cutting the cable.—In the case submitted the neutral state Y, as it is competent to do, declines to assume any responsibility. This places the cable upon the basis of private property.

(*a*) *Cables in time of blockade.*—In this case there is no statement that a blockade exists and that the service of the cable is interrupted on that account. In regard to such interruption there would be no question. Fauchille[2] maintains that when a port is blockaded so that a neutral can not communicate with it, there is no doubt that the blockading belligerent can interrupt the cable as he would a dispatch boat. This position is generally admitted.

(*b*) *Cables as contraband.*—To bring such use of submarine telegraphic cable under the category of contraband is inconvenient and in many respects unfortunate. The tendency is to limit contraband to goods and

[1] See Wilson, Submarine Telegraphic Cables, p. 18, Naval War College Lectures, 1901. Also, For. Rel. 1898, p. 976; 22 Opin. Attys. Gen., pp. 13, 315.

[2] Du Blocus Maritime, p. 248.

to determine their category as contraband or noncontraband by their nature and destination. To regard a cable between an enemy and a neutral as contraband because of its possible hostile use is to resort to a position making needful a course of reasoning unnecessarily complex and confusing. The action of the officer, if justifiable at all, may rather be justifiable on other grounds than that of violation of blockade or of seizure as contraband.

(*c*) *Cables and unneutral service.*—The difference between the carriage of contraband and the aid afforded by the transmission of information was early recognized. Lord Stowell, in the case of the *Atalanta* in 1808, said:

"If a war intervenes and the other belligerent prevails to interrupt that communication (between mother country and colony), any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state, and is justly to be considered in that character. Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of limited nature; but in the transmission of dispatches may be conveyed the entire plan of the campaign that may defeat all the projects of the other belligerent in that quarter of the world. * * * The practice has been, accordingly, that it is in considerable quantities only that the offense of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature." [1]

This opinion of the great English jurist, rendered early in the nineteenth century, shows that the transmission of dispatches of varying character can not properly be

[1] 6 C. Rob., 440, 454.

put in the same category with contraband because so different in nature and results.

Dana, in note 228 to Wheaton, speaking of the carrying of hostile persons or papers in contrast to contraband, says:

"But the subject now under consideration is of a different character. It does not present cases of property or trade, in which such interests are involved, and to which such considerations apply, but simply cases of personal overt acts done by a neutral in aid of a belligerent. Suppose a neutral vessel to transmit signals between two portions of a fleet engaged in hostile combined operations, and not in sight of each other. She is doubtless liable to condemnation. It is immaterial whether these squadrons are at sea or in ports of their own country or in neutral ports, or how far they are apart or how important the signals actually transmitted may be to the general results of the war, or whether the neutral transmits them directly or through a repeating neutral vessel. The nature of the communication establishes its final destination and it is immaterial how far the delinquent carries it on its way. The reason of the condemnation is the nature of the service in which the neutral is engaged."

Hall[1] says:

"With the transport of contraband merchandise is usually classed analogically that of dispatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is, however, more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess of the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connection with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to.

[1] Int. Law, 4th ed., p. 697.

When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry dispatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent."

Lawrence, in his third edition,[1] says:

"In truth, between the carrying of contraband and the performance of what we may term unneutral service there is a great gulf fixed."

And again, after further discussion—

"We are now in a position to distinguish clearly between the offense of carrying contraband and the offense of engaging in unneutral service. They are unlike in nature, unlike in proof, and unlike in penalty. To carry contraband is to engage in an ordinary trading transaction which is directed toward a belligerent community simply because a better market is likely to be found there than elsewhere. To perform unneutral service is to interfere in the struggle by doing in aid of a belligerent acts which are in themselves not mercantile but warlike."[2]

The acts generally regarded as in the category of unneutral service have been enumerated as:

(1) The carriage of enemy dispatches.

(2) The carriage of certain belligerent persons.

(3) Aid by auxiliary coal, repair, supply, or transport ships.

(4) Knowing cooperation in the transmission of certain messages and information to the belligerent.

Knowing cooperation in the transmission of certain messages for the belligerent renders the ship liable to penalty. Such an act as the repetition of signals would fall in this class.

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[1] Int. Law, p. 624. [2] P. 633.

In cases where vessels are engaged in unneutral service the ordinary penalty is the forfeiture of the vessel so engaged. It is held that—

"Submarine telegraphic cables between a belligerent and a neutral state may become liable to censorship or to interruption beyond neutral jurisdiction if used for hostile purposes. A neutral vessel engaged in laying, cutting, or repair of war telegraph cables is held to be performing unneutral service."[1]

Capt. C. H. Stockton, U. S. N., says: "Besides the contraband character of the material of a telegraph cable, in use or en route, as an essential element of belligerent communication which renders it liable to seizure anywhere out of neutral territory, there is another phase of this question, and that is in regard to the nature of the service afforded by such a communication by a neutral proprietor to a belligerent.

"This service is in the nature of both an evasion of a blockade, and, what has been termed of late years, of unneutral service. It does not matter in this phase whether the cable be privately or state owned so far as the technical offense is concerned, though the gravity and consequences are naturally much more serious in the latter case. Let us take, as an instance, the case of a blockaded or besieged port, as Havana and Santiago were during the late hostilities. The communication of information, or of dispatches, or of means of assistance which can be made by such means, is an unneutral service, and would resemble also the violation of blockade by a neutral vessel carrying dispatches, the capture of which on the high seas outside of territorial jurisdiction would be a justifiable and indisputable act of war.

"Extend this to a country or port not blockaded or besieged, and you would yet find the cable, owned, let us presume, by a neutral, the means of performing the most unneutral kind of service, of a nature which, done by a ship, would most properly cause its seizure, condemnation, or destruction by the offended belligerent. * * *

"When possible, cable communication generally should, of course, be kept open for commercial or other

[1] Wilson & Tucker Int. Law, p. 310.

innocent intercourse, and in many cases a government censorship can meet the circumstances and requirements of the war and prevent injury to a belligerent."[1]

Whatever may have been the opinion of the officer as to the ground upon which he was cutting the cable, it was certainly not an act justified by the principles governing the rules in regard to contraband unless the interpretation be forced.

After the notification by the officer no innocent trade basis could be claimed, and whatever element of contraband there may have been before notification disappeared when the official protest was made.

If ship and cargo is liable to seizure for violation of blockade after official notification, then the cable is liable to interruption by analogy, but it is far better to put the use of the cable under such circumstances under its proper category, that of unneutral service, where the intent of the act rather than accidental circumstances is the determining factor in the treatment of the cable.

There remains possible, after one of the belligerents is in position to take control of or interrupt a cable connecting a neutral and the other belligerent, the control or censorship of the cable by the neutral in a manner satisfactory to the first belligerent, the complete discontinuance of the cable service by sealing or otherwise, either by the neutral government or by the owners. None of these courses was followed.

The officer was fully justified in cutting the cable upon the ground that it was rendering an unneutral service.

The claim for damages.—The claim that the officer was acting in a manner contrary to article 5 of the Naval War Code of the United States can not be sustained. This code provides that in time of war, irrespective of their ownership, "submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy."[2] While the code does not specify further what shall be the treatment of a cable connecting an enemy of

[1] Submarine Telegraphic Cables in the Time of War. Proceedings United States Naval Institute, Vol. XXIV, 3, p. 453.

[2] Article 5, (b).

the United States with a neutral and used to transmit hostile messages, the United States has not, in practice, regarded the cutting of such a cable outside of neutral jurisdiction as in anyway forbidden. It is taken as a matter of general acceptance that cables will be cut in the high seas. Article XV of the cable convention of 1884 provided: "It is understood that the stipulations of this convention shall in nowise affect the liberty of action of belligerents." Lord Lyons, representing the British Government, stated that "Her Majesty's Government understands Article XV in this sense, that, in time of war, a belligerent, a signatory of the convention, shall be free to act in regard to submarine cables as if the convention did not exist." The *procès verbal* of this convention shows that this was the general opinion of the representatives present. The Belgian representative interpreted the article as giving by inference the right "to cut submarine cables even though they landed on neutral territory." This same representative also maintained that "the convention has no effect upon the rights of belligerent powers. These rights would be neither more nor less extensive after the signature than they are now." There can be little doubt that in the opinion of these representatives submarine cables beyond neutral jurisdiction might be cut by a belligerent and that it was the expectation of these representatives that this would be freely done in time of war. Captain Squier, writing of "The Influence of Submarine Cables upon Military and Naval Supremacy,"[1] after reviewing the operations of the United States in the Spanish war of 1898, uses such expressions as follows: "It appears that the searching for deep-sea cables in the high seas in the time of war, without an accurate chart of the location of the cables, is a difficult and very doubtful operation; also that submarine cables must in general be interrupted near their landing places, where their exact location can be determined with certainty. * * * Since submarine cables are so important a factor in national defense, they should be protected both at their shore landings and

[1] Proceedings of the United States Naval Institute, Vol. XXVI, 4, pp. 620–622.

on the high seas by military and naval force. * * * We should be able, at the earliest date, to manufacture upon American soil deep-sea cables of the first class; be able to lay, maintain, and repair them in time of peace or war, by ships flying the American flag, and be prepared to adequately protect them upon the high seas and at their landing places, by military and naval force." This position of Captain Squier was quoted with approval in England, June 20, 1901, before the interdepartmental committee on cable communications.[1]

The report of this interdepartmental committee on cable communications, appointed by Parliament on November 29, 1900, was made on March 26, 1902, and distinctly admits that a considerable proportion of the cables touching British territory would be cut in time of war between Great Britain and a foreign power. It is also admitted that this will be so even though proper precautions may protect cables within the three-mile limit. The report (p. 15) says:

"The experience of the Spanish-American war while it brings into prominence the important influence which submarine cable telegraphy exercises in maritime warfare, also shows how large a part is played by chance in cable-cutting operations. We are convinced, however, that there is no serious physical difficulty in cutting cables, and that on the outbreak of war cables may be cut either in shallow water without, or in deep water with, special appliances. While, therefore, it is generally advisable that cables should be landed at fortified positions, where such exist, in order that the instruments and operating stations may be under protection, we would point out that the importance of fortifying the shore ends may be easily exaggerated, because the attempt to break the cable will probably be made at a convenient distance from the shore, beyond the range of guns.

"10. Nevertheless, the great and increasing range of modern artillery will afford, in ordinary cases, fair security against hostile enterprises, up to the three-mile

[1] Minutes of evidence, 3335–3338.

limit of territorial waters, and thus protect the cables in shallow water where they are most vulnerable.

"11. In the second place, strategic arrangements must be made on the assumption that a considerable proportion of cables will be interrupted during war time; and a variety of alternative routes must be provided to all important British possessions and naval stations.

"13.. Cables between Great Britain and British possessions may (*a*) touch only on British soil; (*b*) touch on the territory of foreign states.

"14. The latter, again, will, in time of war, further subdivide themselves into belligerents and neutrals. It will be the interest of the belligerents to interrupt or control, by censorship, the telegraphic communications of their adversaries even to the degree of occasioning detriment to neutrals, and of incurring liability to make compensation to them for arbitrary interference with their cables.

"15. On the other hand, it will be the interest of neutrals to maintain their telegraphic communications, both with one another and with the belligerents, even to the possible detriment of the latter.

"16. If we could accept the assumption that cables would not be cut in time of war, it is clear that for strategic purposes the all-British route would be for the best. * * *

"17. But, as we have already stated, we think that our strategic arrangements must be made on the supposition that a considerable proportion of cables will be cut. * * *

"We thus arrive at two principles leading to diametrically opposite conclusions. The more probable it is that cables will not be cut, the greater the value of an all-British cable. The more probable it is that they can be cut, the greater the value of a cable touching on foreign territory."

On page 42 of this report, in the summary of recommendations, is the statement that, "In view of the probability of cable cutting a variety of alternative routes should be provided wherever it is essential to secure telegraphic communication in time of war."

A recent English writer has correctly understood the attitude of the United States, as practice of the United States has shown. He says: "According to the Naval War Code of the United States, a cable entering a neutral's territory may not be touched. It is safe except when it is outside the three miles line or in the belligerent's territorial waters."

The cutting of the cable.—It has been shown that the United States naval officer, as an act of courtesy, made a protest against the hostile use of the cable connecting the belligerent and the neutral territory; that the neutral declined to assume any responsibility; that the service rendered by this cable was of the nature of unneutral service; that the owners of the cable are not entitled to any damages on account of the interruption of the service, or because of injury to the means of such unneutral service, and that the Naval War Code of the United States does not support this claim.

It may be said that the nature of submarine telegraphic cable service is such as to be of the greatest importance in the time of war and that the belligerent may take measures to protect himself from its improper use. These measures may be proportioned in severity to the dangers which such improper use may entail upon the belligerent.

In general, the penalty for the performance of unneutral service is the confiscation of the agency of such service. This being the case, a cable guilty of unneutral service may become liable to the penalty. Undoubtedly the liability to such a penalty is necessary in order to secure effective supervision of a cable by the owners or by state authorities, or when this supervision can not be secured to bring about the voluntary closing of the line liable to such penalties, unless the owners prefer to run the risk of injury to or confiscation of the cable property in case it comes within the power of the injured belligerent.

Practice, general principles, and opinion alike support the position that a cable connecting one belligerent and a neutral territory and rendering unneutral service is liable to interruption by the other belligerent at any point

outside of neutral jurisdiction. War will often make such interruption a reasonable necessity.

In the "situation" under consideration the United States naval officer would be fully justified in cutting the cable at any point outside neutral jurisdiction.

SITUATION II.

A revolutionary outbreak occurs in a South American state.

The officer in command of a United States ship of war lying in the harbor of the capital city of the South American state is asked by a messenger from the President of that state whether he will receive the President and his cabinet on board the ship of war in case they are in serious danger of personal injury from attack by the insurgents.

What should be the reply of the officer?

SOLUTION.

The commander of the ship of war should reply that his Government discountenances the practice of granting asylum on board of ships of war, and also that the regulations of the service allow the grant of asylum only under extreme and exceptional circumstances, of which he as commander must judge in the actual emergency should such emergency unfortunately arise in regard to the President and his cabinet while he remains in port. The commander could in no case promise asylum for a future time of which the conditions could not be foretold.

NOTES ON SITUATION II.

ARGUMENT IN FAVOR OF PROMISING ASYLUM.

Article 308 of the United States Naval Regulations, 1900, provides as follows:

"The right of asylum for political refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a

refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum."

It is held by some that this article of the Naval Regulations does not apply to a "Situation" like the one proposed, that an officer of the United States should extend to the officers of the constituted government of the state in which they may be as much courtesy as possible, and that to promise asylum under the circumstances would be in accord with practice and would be good policy.

The argument in favor of the grant of asylum is somewhat as follows:

The officer in command of the United States ship of war desires to extend so much courtesy to President and officials of the state in which he is as may be possible, believing that this is merely a temporary uprising against the constituted authority and that the officers of the government are entitled to this courtesy. He has in mind the case of General Savasti, who was received during the revolution of 1895, when the regular government of Ecuador was overthrown and no government had been established.

He believed that an officer of the constituted state was not in the category of those who should be refused when following article 308 of the Naval Regulations of 1900, as outlined in the second sentence, which states that "officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob." He maintains that the circumstances under consideration constitute an exceptional case in which the interests of humanity demand that he shall grant the application even more than in such case of pursuit as mentioned in the Regulations. He further maintains that this is in no sense an invitation, direct or indirect, but merely a reply to a question which demands a reply and to which he would give an affirmative reply even should he read to the foreign minister Regulation 308, which provides for just such an extreme and exceptional case.

It has been said that:

"As to whether the degree of humanity involved justifies the granting of an asylum the commanding officer

on the spot must be the judge and can be guided only by international precedents and Naval Regulations."

The officer maintains that the Regulations do not forbid an affirmative reply, and that the international precedents and authorities also sanction his action as it affects the officials of the constituted government.

Hall, speaking of harboring criminals and nonpolitical offenders, says of political refugees:

"The case is again different if a political refugee is granted simple hospitality. The right to protect him has been acquired by custom. He ought not to be sought out or invited, but if he appears at the side of the ship and asks admittance he need not be turned away, and so long as he is innoxious the territorial government has no right either to demand his surrender or to expel the ship on account of his reception."

And in a note—

"Something more may be permitted, or may even be due, in the case of the chiefs, or of prominent members of a government overturned by revolution. They retain a certain odour of legitimacy. In 1848 the admiral commanding the British Mediterranean Squadron detached a vessel to take the pope on board in case refuge were needed; and in 1862, on the outbreak of revolution in Greece, a British frigate escorted a Greek man of war with the King and Queen on board, out of Greek waters and received them so soon as some slight danger of mutiny appeared."[1]

He also cites the letter of Secretary Olney to Mr. Tillman, minister to Ecuador, September 25, 1895, in which Mr. Olney says:

"I note your statement that the family of the late minister of war came to your residence on the seventeenth of August seeking shelter, and that, at the date you write, they were still inmates of your house. You add that General Savasti himself joined them on the following night, and still remains your guest, quite ill. The shelter thus given by you to one of the prominent members of the overturned government, and as it appears

[1] Int. Law, p. 203, 4th ed.

similarly granted by other foreign representatives to the families of members of the late government, does not appear up to the time of writing to have been of the nature of asylum as the word is properly understood by international authorities, there having been apparently no national or municipal government in the capital. Shelter under such circumstances was a mere act of humanity, unaccompanied by an assumption of extra-territorial prerogatives by you, or interference with any rights of legitimate government or sovereignty. This is quite distinct from the so-called right of asylum, which can logically only be exercised in disparagement of the rights of the sovereign power by withdrawing an accused subject from its rightful authority."

Then Mr. Olney quotes the instructions of Mr. Fish and Mr. Frelinghuysen discountenancing the practice of granting asylum, and stating that the Department's printed personal instructions relate in terms to the extension of asylum to unsuccessful insurgents and conspirators as an act of humanity when the hospitality afforded does not go beyond sheltering the individual from lawlessness. It may not be tolerated should it be afforded with a view to remove a subject beyond the reach of the law to the disparagement of the sovereign authority of the state.

"It seems to be very generally supposed that the case of a member of an overturned titular government is different; and so it may be until the empire of law is restored and the successful revolution establishes itself in turn as the rightful government, competent to administer law and justice in orderly process. Until that happens the humane accordance of shelter from lawlessness may be justifiable; but when the authority of the state is reestablished upon an orderly footing, no disparagement of its powers under the mistaken fiction of extraterritoriality can be countenanced on the part of the representatives of this Government." [1]

The officer of the United States bases his claim to correct action in granting the request of the messenger

[1] For. Rel., 1895, p. 245.

on the ground that this is an exceptional case as provided for by the Naval Regulations; that it is not an invitation direct or indirect; that, as stated in Snow's Lectures, p. 28, he is supported by international precedents; that the position assumed is supported by Hall in his statement that "something more may be permitted, or may even be due, in the case of the chiefs, or of prominent members of a government overturned by revolution. They retain a certain odour of legitimacy," and further that the letter of Mr. Secretary Olney to Mr. Tillman in 1895 fully justifies his course as not being asylum but merely shelter, not interfering with the rights of legitimate government or sovereignty. As Mr. Olney says:

"This is quite distinct from the so-called right of asylum, which can logically only be exercised in disparagement of the right of the sovereign power by withdrawing an accused subject from its rightful authority."

By these and other arguments he maintains that he should grant an affirmative reply to the messenger of the constituted authorities. The officer also cites the instructions issued by the Secretary of the Navy during the civil war in Chile in 1891:

"In reference to the granting of asylum, your ships will not, of course, be made a refuge for criminals. In the case of persons other than criminals, they will afford shelter wherever it may be needed, to Americans first of all, and to others, including political refugees, as far as the claims of humanity may require and the service upon which you are engaged will permit."

"The obligation to receive political refugees and to afford them an asylum is in general, one of pure humanity. It should not be continued beyond the urgent necessities of the situation, and should in no case become the means whereby the plans of contending factions or their leaders are facilitated. You are not to invite or encourage such refugees to come on board your ship, but should they apply to you, your action will be governed by considerations of humanity and the exigencies of the service upon which you are engaged."

ARGUMENTS AGAINST PROMISING ASYLUM.

In a parallel case in regard to asylum in legations consequent upon uprisings in Ecuador in 1899[1] the United States minister maintains that he was acting, in promising asylum if need be to the chief officials of the government of Ecuador, on the ground that he "would have saved from death the legitimate heads of the government until such time as they could again assume the functions of their respective offices."

Secretary Hay, replying, reviews the conclusions of Secretary Olney already cited, particularly the clause reading:

"It seems to be generally supposed that the case of a member of an overturned titular government is different; and so it may be until the empire of law is restored and the successful revolution establishes itself in turn as the rightful government, competent to administer law and justice in orderly process. Until that happens the humane accordance of shelter from lawlessness may be justifiable; but when the authority of the state is reestablished upon an orderly footing no disparagement of its powers in the mistaken fiction of extraterritoriality can be countenanced on the part of representatives of this Government."

Commenting on this position, Secretary Hay says:

"From the foregoing considerations it is evident that a general rule, in the abstract, can not be laid down for the inflexible guidance of the diplomatic representatives of the Government in according shelter to those requesting it. But certain limitations to such grant are recognized. It should not, in any case, take the form of a direct or indirect intervention in internecine conflicts of a foreign country, with a view to the assistance of any of the contending factions, whether acting as insurgents or as representing the titular government.

"I therefore regret that I am unable to approve the promise of shelter made by you to the members of the titular government before the emergency had actually arisen for decision as to whether the circumstances then existing would justify or make it permissible, and

[1] For. Rel. U. S., 1869, 256–8.

especially am I unable to approve the apparent ground or motive of the promise that you would have saved from death the legitimate heads of the government 'until such time as they would again assume the functions of their respective offices.'

"The Government of the United States remains a passive spectator of such conflicts unless its own interests or the interests of its citizens are involved, and I conceive that it might lead to great abuses in the grant of such shelter, which is afforded only from motives of humanity, if assurances were given in advance to leaders of either of the contending factions that they might carry the conflict to whatever extremes with the knowledge that at last they should enjoy impunity in the protection of this Government; yet such might be construed as the practical effect of the assurance given in this case. I am therefore constrained to withhold my approval of the assurances given at the time and under the circumstances stated in your dispatches and as understood by the Department."

Still less is there reason for the commander to promise to grant asylum on board a ship of war since he is liable to receive orders at any moment which may change his plans or move the ship to another part of the world.

The naval officer can not foretell the circumstances under which the President and his cabinet may finally come to him. He can not foretell what his own circumstances may be at a time indefinite in the future—indeed, he is not certain that his ship will be in the harbor or in condition to receive the President and cabinet in their emergency. As a promise to receive these persons would, in a measure, prejudge a controversy to which he should remain a "passive spectator," he would not be justified in making an affirmative reply.

He should therefore reply that his Goverment discountenances the practice of granting asylum on board ships of war, and the regulations of the service allow it only under extreme and exceptional cases, of which he would be obliged to judge in the actual emergency should such emergency unfortunately arise in regard to the President and cabinet or other persons while he remains in port. He could in no case promise asylum in advance of the urgent necessity.

SITUATION III.

At a port in China which is held under lease by a European state and at which there is no consul of the United States, a near-by American consul accredited to China attempts to exercise his ordinary extraterritorial jurisdiction. His authority is denied by a representative of the European state, and he appeals to the commander of an American war vessel in port to support him in the exercise of his authority.

What position should the commander take?

SOLUTION.

The commander should take the position that he could not support the consul accredited to China in the exercise of authority within territory thus held under lease by a European power.

The commander can assume that he is himself authorized to exercise those consular functions which are under such circumstances specifically delegated to naval officers by his government.[1]

NOTES ON SITUATION III.

STATUS OF LEASED TERRITORY.

The actual status of the territory acquired by lease from China to European powers has not been determined. By the treaties of the United States with China, United States consuls have certain rights over and above those ordinarily exercised in European countries. In the strictly Chinese portions of the Empire these rights still exist. The existence of these powers or of any right to exercise consular jurisdiction of any kind within the portions of China leased to various European states depends upon the effect of the lease of territory by one state to another. This must be decided by reference to fundamental principles and by the terms of the contract.

[1] U. S. N. Regs., art. 517.

In regard to the terms of the contract the Tsung-li Yamén in setting forth the terms and conditions arrived at with the German minister in the matter of the lease of Kiaochow, which was one of the incidental items in the reparation made by China for the murder of two missionaries in Shantung province, made the following statement to the Emperor, after detailing the other demands of China:

"Considering that there has never been any disagreement existing between China and Germany and that the German Government came to the assistance of China in securing the evacuation of Liaotung Peninsula by the Japanese for which she has never been recompensed; and further, as England, France, and Russia have taken maritime ports in the East, and as Germany has no port as a rendezvous for her vessels and for a coaling station, her position is not equal to the other great powers. Your memorialists have on several occasions received notes and telegrams from Hsu Ching Cheng, Chinese minister to Germany, stating that Kiaochow is the place that Germany has been longing for, hence in February of last year your memorialists asked the sanction of Your Majesty to the building of a dock there. The question of devising some arrangements was therefore taken in hand. He (the German minister) finally stated that Germany wished to lease Kiaochow and territory inland, extending 100 li, upon the same conditions as the settlements and concessions at the ports, the rent to be paid annually; that the territory should be self-governing, i. e., under Germany, but still belong to China."[1]

The lease stated that, "This port was occupied by Germany on November 14, 1897, and the following agreement, though not officially proclaimed, is given in the directory referred to as a correct translation from the Chinese:

"His Majesty the Emperor of China, being desirous of preserving the existing good relations with His Majesty the Emperor of Germany, and of promoting an increase of German power and influence in the far east,

[1] For. Rel. U. S., 1898, 189.

sanctions the acquirement, under lease, by Germany of the land extending for 100 li at high tide (at Kiaochow).

"His Majesty the Emperor of China is willing that German troops should take possession of the above-mentioned territory at any time the Emperor of Germany chooses. China retains her sovereignty over this territory, and should she at any time wish to enact laws or carry out plans within the leased area she shall be at liberty to enter into negotiations with Germany with reference thereto: *Provided, always*, That such laws or plans shall not be prejudicial to German interests. Germany may engage in works for the public benefit, such as waterworks, within the territory covered by the lease without reference to China. Should China wish to march troops or establish garrisons therein, she can only do so after negotiating with and obtaining the express permission of Germany.

"II. His Majesty the Emperor of Germany being desirous, like the rulers of certain other countries, of establishing a naval and coaling station and constructing dockyards on the coast of China, the Emperor of China agrees to lease to him for the purpose all the land on the southern and northern sides of Kiaochow Bay for a term of ninety-nine years. Germany is to be at liberty to erect forts on this land for the defense of her possessions therein.

"III. During the continuance of the lease, China shall have no voice in the government or administration of the leased territory. It will be governed and administered during the whole term of ninety-nine years solely by Germany, so that the possibility of friction between the two powers may be reduced to the smallest magnitude. The lease covers the following districts: * * *

"Chinese ships of war and merchant ships, and ships of war and merchant ships of countries having treaties and in a state of amity with China, shall receive equal treatment with German ships of war and merchant ships in Kiaochow Bay during the continuance of the lease. Germany is at liberty to enact any regulation she desires for the government of the territory and harbor,

provided such regulations apply impartially to the ships of all nations, Germany and China included.

"IV. Germany shall be at liberty to erect whatever lighthouses, beacons, and other aids to navigation she chooses within the territory leased, and along the islands and coasts approaching the entrance to the harbor. Vessels of China and vessels of other countries entering the harbor shall be liable to special duties for the repair and maintenance of all lighthouses, beacons, and other aids to navigation which Germany may erect and establish. Chinese vessels shall be exempt from other special duties.

"V. Should Germany desire to give up her interest in the leased territory before the expiration of ninety-nine years, China shall take over the whole area, and pay Germany for whatever German property may at the time of surrender be there situated. In case of such surrender taking place, Germany shall be at liberty to lease some other point along the coast. Germany shall not cede the territory leased to any other power than China. Chinese subjects shall be allowed to live in the territory leased, under the protection of the German authorities, and there carry on their avocations and business as long they conduct themselves as peaceable and law-abiding citizens. * * * Fugitive Chinese criminals taking refuge in the leased territory shall be arrested and surrendered to the Chinese authorities for trial and punishment upon application to the German authorities, but the Chinese authorities shall not be at liberty to send agents into the leased territory to make arrests. The German authorities shall not interfere with the likin stations outside but adjacent to the territory."[1]

"The Japanese claim that sovereignty is too important a matter to pass thus with a lease, and say that China can, if she wishes, surrender jurisdiction over her own people, but they do not agree that these lessee governments shall or can exercise jurisdiction over other foreigners in the leased territory. However, no case has yet arisen for them to test the matter."[2]

[1] For. Rel. U. S., 1900, 383. [2] Ibid., 385.

The Japanese claim that sovereignty has not passed to the leasing power is supported by the terms of the other cession agreements, as in the Russian agreement, which states in Article I that:

"The Emperor of China agrees to lease to Russia Port Arthur and Talienwan, together with the adjacent seas, but on the understanding that such lease shall not prejudice China's sovereignty over this territory."

The British position is quite similar to the Russian. The lease is for "so long a period as Port Arthur shall remain in the occupation of Russia."

The general position assumed by the powers is not that sovereignty has passed, but that the jurisdiction to the extent named in the treaty of cession has passed to the leasing power.

It is generally the case that the right of sovereignty carries with it all other rights and obligations. As Hall (p. 51) says:

"In principle, then, the rights of sovereignty give jurisdiction in respect of all acts done by subjects or foreigners within the limits of the state, of all property situated there, to whomsoever it may belong, and of those acts done by members of the community outside the state territory of which the state may choose to take cognizance.

"In practice, however, jurisdiction is not exercised in all these directions to an equal extent."

Sovereignty is the "supreme political power beyond and above which there is no political power. It is not inconsistent with sovereignty that a state should voluntarily take upon itself obligations to other states, even though the obligations be assumed under the stress of war or fear of evil," and—

"The right of jurisdiction is the right to exercise state authority. The right of jurisdiction is in general coextensive with the *dominion* of the state."[1]

As Judge Story says, it may be "laid down as a general proposition that all persons and property within the territorial jurisdiction of a sovereign are amenable to the

[1] Wilson & Tucker, p. 40.

jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights."[1]

If, then, by understanding and treaty statement of both China and the leasing powers, it is jurisdiction and not sovereignty that has passed to the leasing powers, it remains only to consider what jurisdiction involves. As already defined, jurisdiction "is the right to exercise state authority." It is necessary for administrative officers of the United States to know who are the persons authorized to exercise state authority. In the case under consideration it is without doubt the agents of the leasing powers of the several ports. As Mr. Conger reports to Secretary Hay:

"I have conferred with the English, German, Russian, French, Spanish, Netherlands, and Japanese ministers upon the subject, and all of them except the Japanese, agree that the control over all of these leased ports has, during the existence of the lease, passed as absolutely away from the Chinese Government as if the territory had been sold outright, and that they are as thoroughly under jurisdiction of the lessee governments as any portion of their home territory, and their consuls, accredited to China, would not attempt to exercise jurisdiction in any of said ports."

Secretary Hay's opinion as to the relation to the leased territory of near-by consuls accredited to China shows the position of the United States, which is fully sustained by general principles and treaty agreements. He gives the conclusion that:

"The intention and effect of China's foreign leases, having apparently been the relinquishment by China during the term of the leases and the conferment upon the foreign power of all jurisdiction over the territory, such relinquishment and transfer of all jurisdiction would seem also to involve the loss by the United States of its right to exercise extraterritorial consular jurisdiction in the territories so leased, while, as you remark, as

[1] "Santissima Trinidad," 7 Wheat., 354.

these territories have practically passed into the control of peoples whose jurisprudence and methods are akin to our own, there would seem to be no substantial reason for claiming the continuance of such jurisdiction during the foreign occupancy or tenure of the leased territory.

"As a corollary to this view, which from your statement appears to be held by all the powers, with the exception of Japan, the ordinary consular functions prescribed and defined in the intercourse of the Christian powers among themselves could obviously not be exercised within the leased territory by a consul of the United States stationed in neighboring Chinese territory without some express recognition of his official character, by exequatur or otherwise, on the part of the sovereign into whose control the territory has passed by lease for the time being."[1]

In the case cited, the representative of the European state presumably would be acting in accordance with orders from his government and would be supported by it.

"Its administrative officers (of a state) and its naval and military commanders are engaged in carrying out the policy and the particular orders of the government, and they are under the immediate and disciplinary control of the executive. Presumably, therefore, acts done by them are acts sanctioned by the state, and until such acts are disavowed and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them."[2]

A commander of an American man-of-war can only exercise the functions of a consul in relation to mariners of the United States.[3]

"He has, when in a foreign port where there is no United States consul, or upon the high seas when senior officer, the authority of law to exercise the powers of a consul in regard to mariners of the United States."[4]

Conclusions.—Pending the agreement between the United States and the leasing powers there would be no

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[1] For. Rel. U. S., 1900, 386.
[2] Hall, p. 226.
[3] Snow, 2d ed., p. 63, pars. 6–7.
[4] U. S. N. Regs., art. 5 17.

person authorized other than by such regulations to exercise consular jurisdiction.

The denial of consular jurisdiction by the authority of the leasing state is justifiable and necessary as it could have no legality if allowed.

The commander of the American war vessel should therefore take the position that he could not support the consul in the exercise of any authority under the circumstances.

It is now probable that in nearly all cases the near-by consuls will also be authorized to perform, in the leased ports, the usual functions permitted under similar circumstances in the European countries, but in every instance this will require special authorization.

It must be understood that this solution applies only to places leased under definite agreements over which European states have assumed responsible jurisdiction and not to regions considered under spheres of influence and similar indefinite terms.

Of this Secretary Hay says:

"It remains to be determined in what manner the interests of American citizens in such leased territories are to be watched over and, in case of need, protected by the agencies common in the intercourse of civilized powers. Those interests, often situated in the interior, remain for the most part under the same Chinese surroundings as heretofore, the superior control of the lessee power being manifested through native agencies and by way of influence rather than by direct administration. Under such circumstances, the United States can not be expected to forego the use of all the customary agencies of intercourse in behalf of its citizens and their property and commerce. It is presumed the other governments represented in China feel in the same way their responsibility to watch over their own citizens or subjects found within any leased territory not under their own national flag."

The action of the commander in case submitted would not merely be to decline to support consul but to himself assume consular functions to extent allowed and prescribed by regulations of his service.

SITUATION IV.

If, on August 20, 1898, a United States war ship had entered the harbor of Hongkong to take coal for San Francisco or Honolulu as might be permitted, and the commander had been informed that he could take only coal enough to carry the ship to Manila as that was the "the nearest port of her own country," should he protest, and why?

What constitutes a "port of a home country," and why?

SOLUTION.

The commander should protest against the decision that Manila, a port simply under the military control of the United States for the time being, was for the ship "the nearest port of her own country."

This protest should be upon the ground that military occupation does not transfer nationality.

He should state that the term "port of her own country" is one within the political sovereignty of the flag of the vessel and not any port temporarily occupied by the forces under the same flag.

NOTES ON SITUATION IV.

Basis of action at Hongkong.—As Hongkong is a crown colony the proclamation of neutrality issued by Great Britain becomes binding there. This proclamation, signed April 23, 1898, has appended a letter from the foreign office containing the general regulations for the observance of neutrality, to the effect that "the governor or other chief authority of each of Her Majesty's territories or possessions beyond the seas shall forthwith notify and publish the above rules." Of these rules the third provides that:

"No ship of war of either belligerent shall hereafter be permitted, while in any such port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, to take in any supplies, except provisions and such other

things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination, and no coal shall again be supplied to any such ship of war in the same or any other port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters aforesaid."

The provision of the rule "or to some nearer destination," does not apply in the case under consideration, as the vessel has no destination nearer than a port of her own country.

The first question is, then, whether the authorities at Hongkong were justified in interpreting "nearest port of her own country" to mean Manila, on August 20, 1898.

How was Manila related to the United States on August 20, 1898?—In the Legal Tender Cases, 1870, Mr. Justice Bradley announced the generally accepted position:

"The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all foreign relations of the country, war, peace, and negotiations, and intercourse with other nations."[1]

It is therefore necessary to look to the Government of the United States to learn what relations exist between the United States and Manila.

By another decision "The President and Congress are vested with all the responsibility and powers of the Government for the determination of questions as to the maintenance and extension of our national dominion."[2]

The courts therefore maintain that the attitude taken by the political branches of the Government within the Constitution is final. In other cases, the courts have decided that the government of new territory belongs

[1] 12 Wall., 555, U. S. Supreme Court.
[2] 50 Fed. Rep., 110.

"primarily to Congress, and secondarily to such agencies as Congress may establish."[1]

On August 12, 1898, the competent agencies ordered a suspension of hostilities. It was not till four months later that the treaty of peace determined the final disposition of the Philippine Islands. On August 13, 1898, Manila was surrendered to Governor Merritt, who immediately proclaimed martial law.

In General Orders No. 3, on August 9, 1898, published in the "Official Gazette, Manila," on August 20, 1898, by command of General Merritt, is the following statement of the position:

"In view of the extraordinary conditions under which this army is operating, the commanding general desires to acquaint the officers and men comprising it with the expectations which he entertains of their conduct.

"You are assembled upon foreign soil situated within the western confines of a vast ocean separating you from your native land, etc."

This seemed to be foreign soil in the eyes of General Merritt on August 9, when the orders were issued, and presumable also at the time of printing the orders on August 20.

By an order issued by General Merritt to the people of the Philippines August 14, 1898, Article V, it was announced that:

"The port of Manila, and all the other ports of and places in the Philippines which may be in the actual possession of our land and naval forces, will be open, while our military occupation may continue, to commerce of all neutral nations as well as our own, in articles not contraband of war, and upon payment of the prescribed rates of duty which may be in force at the time of importation."

A telegram from the Navy Department, August 12, 1898, says:

"The protocol, signed by the President to-day, provides that the United States will occupy and hold the city, bay, and harbor of Manila pending the conclusion

[1] 18 Wall., 319.

of a treaty of peace, which shall determine the control, disposition, and government of the Philippines. This most important.

"ALLEN, *Acting.*"

This was in accord with Article III of the protocol.

The telegram of August 17, 1898, read as follows:

"The United States in possession of city, bay, and harbor of Manila must preserve peace, protecting persons and property in territory occupied by the military and naval forces."

On August 22, 1898, General Merritt issued General Orders No. 8, "For the maintenance of law and order in those portions of the Philippines occupied or controlled by the Army of the United States," and on August 26, 1898, General Merritt by "direction of the President of the United States" assumed his duties as military governor of the Philippines.

The protocol of August 12, 1898, agreed that:

"Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended, and notice to that effect shall be given as soon as possible by each government to the commanders of its military and naval forces."[1]

The résumé in the instructions issued by President McKinley and addressed to the Secretary of War, December 21, 1898, gives the following statement:

"SIR: The destruction of the Spanish fleet in the harbor of Manila by the United States naval squadron commanded by Rear Admiral Dewey, followed by the reduction of the city and the surrender of the Spanish forces, practically effected the conquest of the Philippine Islands and the suspension of Spanish sovereignty therein. With the signature of the treaty of peace between the United States and Spain by their respective plenipotentiaries at Paris, on the 10th instant, and as a result of the victories of American arms, the future control, disposition, and government of the Philippine Islands are ceded to the United States. In fulfillment of the rights

[1] Article VI.

of sovereignty thus acquired, and the responsible obligations of government thus assumed, the actual occupation and administration of the entire group of the Philippine Islands becomes immediately necessary, and the military government heretofore maintained by the United States in the city, harbor, and bay of Manila is to be extended to the whole of the ceded territory."

In the case 1444, Division of Insular Affairs, War Department, it is stated that:

"At the time of the peace conference at Paris in 1898 all the rights of Spain in the islands above mentioned (Porto Rico, the Philippines, and Gaum) had not been obliterated. The sovereignty of Spain therein had been displaced and suspended but not destroyed. Theoretically Spain retained the right of sovereignty, but the United States was in possession and exercising actual sovereignty. The rights of the United States were those of a belligerent and arose from possession and were dependent upon the ability to maintain possession. Under the doctrine of postliminy the sovereignty and rights of Spain would become superior to those of the United States, if by any means Spain again came into possession of one or all of said islands. The American commission therefore required, as a condition precedent to a peace, that Spain surrender this right of repossession."[1]

By Article III of the treaty with Spain "Spain cedes to the United States the archipelago known as the Philippine Islands and comprehending the islands lying within the following lines, etc."

In Flemming et al. *v.* Page, speaking of the Mexican war, the Supreme Court says:

"The boundaries of the United States as they existed when war was declared against Mexico were not extended by conquest; nor could they be regulated by the varying incidents of war and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was without the limits of the United States, as previously established

[1] The Law of Civil Government under Military Occupation, p. 45, Magoon's Reports, U. S. Govt., 1902.

by the political authorities of the Government, was still foreign."[1]

"Military government is the authority by which a commander governs a conquered district when local institutions have been overthrown and the local rulers displaced, and before Congress has had an opportunity to act under its power to dispose of captures or govern territories. This authority in fact belongs to the President and it assumes the war to be still raging and the final status of the conquered province to be determined, so that the apparent exercise of civil functions is really a measure of hostility."[2]

The claim of the United States to the territory now known as New Mexico was acquired by conquest, the treaty of peace with Mexico merely acknowledging the fact that said territory already had been conquered. On the other hand the Philippine Islands are specifically ceded to the United States, and furthermore, there is a money payment In answer, then, to the first question, "How was Manila related to the United States on August 20, 1898?", the courts, the administrative departments of the Navy and Army, the political branches of the United States, and the authorities of Spain agree that the "city, bay, and harbor of Manila" was simply occupied by the military and naval forces of the United States, and that the future of the Philippine Islands was to be determined by the treaty of peace.

Further, there was every reason to believe that this fact of military occupation without any further rights or powers on the part of the representatives of the United States was fully known to the British authorities at Hongkong.

What is the effect of such military occupation as the United States forces had established in Manila on and before August 20, 1898.—From the preceding discussion it is evident—

(1) That the British authorities at Hongkong were bound not to allow a United States vessel of war to take

[1] 9 Howard, 616. [2] Pomeroy Const. Law, 595.

on coal beyond the limit required to reach "the nearest port of her own country."

(2) That the "city, bay, and harbor of Manila" were "occupied by the military and naval forces of the United States," and that this was military occupation only, commonly called belligerent or hostile occupation.

The question as to the effect of military occupation then follows.

In an early case[1] it is stated that:

"The holding of a conquered territory is regarded as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. * * * The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state."

Again the court says in regard to the military occupation of 1814:

"But, on the other hand, a territory conquered by an enemy is not to be considered as incorporated into the dominions of that enemy, without a renunciation in a treaty of peace, or a long and permanent possession. Until such incorporation, it is entitled to the full benefit of the law of postliminy."[2]

"By reason of the victory of the fleet under Dewey's command in Manila Bay and the subsequent capture of the city of Manila by the military forces of the United States, under the law and usages of war the military occupation of territory creates an obligation to provide for the administration of the affairs of civil government in the occupied territory. This obligation is binding upon the military authorities of the United States, and the resulting duty may be discharged by them. (Cross

[1] American Ins. Co. *v.* Canter, 1 Peters, 511.

[2] United States *v.* Hayward, 2 Gall., 485.

et al. *v.* Harrison, 16 How., 164, 193; Leitensdorfer *v.* Webb, How., 176, 177.)

"Governments so created are intended to perform two services—promote the military operations of the occupying army and preserve the safety of society. (Ex parte Milligan, 4 Wall., 127.)

"For the accomplishment of these purposes such a government, to use the language of the United States Supreme Court, "may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exercised in such cases save those which are found in the laws and usages of war. * * * In such cases the laws of war take the place of the Constitution and laws of the United States as applied in the time of peace."[1] (New Orleans *v.* Steamship Company, 20 Wall., 394.)

Chief Justice Marshall (in The American and Ocean Insurance Company) said:

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as mere military occupation until its fate shall be determined by a treaty of peace."

The Laws of War on Land adopted at Oxford, September 9, 1880, and generally accepted by civilized states, and in accord with the rules of the Hague conference, define occupied territory:

"A territory is considered to be occupied when, as the result of its invasion by an enemy's force, the state to which it belongs has ceased, in fact, to exercise its ordinary authority within it, and the invading state is alone in a position to maintain order. The extent and duration of the occupation are determined by the limits of space and time within which this state of things exists." Rule 41.

"The sovereignty of the occupied territory does not pass to the occupying state, but only the right to exercise the authority necessary for safety and operations of

[1] Magoon's Law of Civil Government under Military Occupation, p. 216.

war. * * * Belligerent occupation begins when an invaded territory is effectively held by a military force."[1]

"The occupation applies only to the territory where such authority is established and in a position to assert itself."[2]

Therefore the sphere of occupation might change from day to day.

Hall says of the effect of military occupation:

"When an army enters a hostile country, its advance by ousting the forces of the owner puts the invader into possession of territory which he is justified in seizing under his general right to appropriate the property of his enemy. But he often has no intention of so appropriating it, and even when the intention exists, there is generally a period during which, owing to insecurity of possession, the act of appropriation can not be looked upon as complete. In such case the invader is obviously a person who temporarily deprives an acknowledged owner of the enjoyment of his property; and logically he ought to be regarded either as putting the country which he has seized under a kind of sequestration, or, in stricter accordance with the facts as being an enemy who in the exercise of violence has acquired a local position which gives rise to special necessities of war, and which therefore may be the foundation of special belligerent right. * * * Recent writers adopt the view that the acts which are permitted to a belligerent in occupied territory are merely incidents of hostilities; that the authority which he exercises is a form of the stress which he puts upon his enemy; that the rights of the sovereign remain intact (p. 487). * * * If occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possesses over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war; in other words, he has the right of exercising such control, and such control only, within

[1] Wilson & Tucker, Int. Law, p. 251.

[2] Hague Convention, War on Land. Article XLII.

the occupied territory as is required for his safety and the success of his operations."[1]

Military occupation differs from conquest.

"Conquest in the technical sense of the status of a territory which has come permanently under the jurisdiction of the enemy is distinct from military occupation, which is a simple fact supported by force.

"Military occupation may pass into conquest (1) by actual occupation for a long period with intention on the part of the occupier to continue the possession for an indefinite period, provided there has not been a continued and material effort upon the part of the former holder to regain possession. If, after a reasonable time, this effort to regain possession seems futile, the conquest may be regarded as complete. Each state must judge for itself as to the reasonableness of the time and futility of the effort. (2) Conquest may be said to be complete when by decree, to which the inhabitants acquiesce, a subjugated territory is incorporated under a new state. (3) A treaty of peace or act of cession may confirm the title by conquest."[2]

From what has been said there is an agreement sufficient to be called general that the city, bay, and harbor of Manila was in a state of hostile occupancy by the United States on August 20, 1898; that such occupancy does not work a change of nationality in the territory so occupied, and that the change in nationality occurs only when the conclusion of the treaty of peace or long uninterrupted holding after conquest shows no intent on the part of the original holders to maintain their title to the occupied territory.

It is certain that the uninterrupted holding by the United States had not been sufficiently long, sufficiently complete and uncontested (as the city had only been taken a week before) to warrant any claim of title in the United States. It was certain that no agreement conferring this territory upon the United States had been made. It is certain that the United States had made no claim to this territory other than that of hostile occupancy.

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[1] Int. Law, 4th ed., p. 481. See p. 488, sec. 155.

[2] Wilson & Tucker, p. 99.

Thus as Manila had not been incorporated into the United States on August 20, 1898, it could not be considered "a port of her own country." Again it might be an offense to Spain to give expression to such an opinion pending negotiations the issue of which could not be foretold. There was no way by which it could be presumed by the British authorities that this might ultimately be incorporated by the United States rather than be restored to Spain, be made an independent state or be disposed of otherwise.

The United States has also led the way in giving an interpretation to the rule as is shown in the proclamation of President Grant, October 8, 1870, when it allowed "only sufficient coal to take the vessel to the nearest European port of her own country," regardless of the fact that there were island ports of one of the belligerents nearer. This by implication eliminates ports which are in doubt or are liable to involve hardship if made the points to which vessels must of necessity set out. Of course a neutral may make further regulations for safeguarding herself against abuses of coaling privileges if the vessel, unless the ordinarily accepted contingencies of accident, weather, or other stress prevent, does not sail to the port for which it sets out.

Grounds of the commander's protest.—The commander of the war ship should protest against the decision of the authorities at Hongkong that Manila was on August 20, 1898, "the nearest port of her own country" in the intent of the neutrality proclamation.

He should protest on the ground that:

(1) Manila is simply in a state of hostile occupancy.

(2) That hostile occupancy does not transfer nationality in people or place.

(3) That it is only by the terms of peace or long occupancy that Manila could become "a port of the home country."

(4) That the condition of Manila was itself uncertain while so small an area was occupied.

(5) That to affirm that Manila was a United States port prejudged the Spanish rights which might revert by postliminy.

(6) That the request for coal for Honolulu at least was a reasonable one, and that a statement that the vessel would not journey to Manila would be made if there were any question still remaining.

What constitutes a "port of a home country?"—The question as to what constitutes, as it is called in the British and other neutralization proclamations, "port of her own country" is in part already answered. It is a port in which the political authority of the state would have full vigor. The element "own country," in this international sense, implies within the sovereign authority, which manifestly Manila can not be, for it is merely military authority by power of arms, without political competence, that the United States is exercising on August 20, 1898. Further, a "port" implies, when applied to a home country, a place in which full rights and privileges are secured without effort upon the part of the domestic vessel but as a right requiring no defense.

Manila is not such a harbor.

Further, it may be said that "port of her own country" can not be construed to mean merely a point within its jurisdiction, unless such point be a reasonably suitable port considering the nature of the vessel. A harbor which would be of such a character as to forbid entrance or make it exceedingly dangerous in time of peace would not be a reasonable harbor, nor would one for the time being in the possession of the enemy. While the neutral is bound to exercise "due diligence," the neutral is not bound to carry on war or sacrifice itself or its merchants unduly for either of the belligerents. As Wharton has said:[1]

"To require a neutral to shut up its ports so as to exclude from coaling all belligerents would expose a nation with ports as numerous as those of the United States to an expense as great as would be imposed by actual belligerency. It is on the belligerent who goes to war, not on the neutral, who desires to keep out of it, that should be thrown expenses so enormous and constitutional strains so severe as those thus required."

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[1] Criminal Law, 9th ed., sec. 1908.

A "port of the home country" would, then, be a reasonably suitable harbor at a point which is within the political sovereignty of the state to which the vessel belongs.

Conclusion.—In conclusion, then, the commander has a right to protest against the action of the authorities at Hongkong, and to claim that Manila was not, on August 20, 1898, a port of the United States, but was nothing more than a temporary military base.

The term "port of a home country" must be given an interpretation which will permit a reasonably suitable harbor within the full political sovereignty of the flag of the vessel.

SITUATION V.

While states X and Y are at war a port of X is blockaded by Y. There are merchant vessels and a war vessel of the United States in the port. The authorities of state X set adrift rafts loaded with explosives in the hope that they will come in contact with and destroy vessels of the blockading squadron. The captains of the United States merchant vessels request the commander of the war vessel of the United States to protest against this action as contrary to international law and as unnecessarily endangering neutral shipping.

How should the commander act and on what grounds?

SOLUTION.

The commander of the ship of war of the United States should inform the captains of the merchant vessels that he cannot protest against necessary acts of war which clearly are aimed at the enemy.

He might, however, request of the authorities of the port an opportunity for the United States merchant vessels to remove to a point of greater safety provided the necessities of the war would allow.

A belligerent is bound by the necessities of war, and should, so far as such necessities permit, guard from danger neutrals by courtesy within the port, but can not be expected to use greater care in this respect than in regard to shipping flying its own national flag.

NOTES ON SITUATION V.

Methods used in war between Chile and Peru.—During the war between Chile and Peru there were varying rumors that questionable methods were employed by the belligerents in carrying on the war. Of one of these Mr. Evarts, writing under date of January 25, 1881, says:

"This report is that the Peruvians have made use, during the present war with Chile, of 'boats containing explosive materials' which have 'in some instances been

set adrift on the chance of their being fallen in with by some of the Chilean blockading squadron.' How far the case of the launch to which you refer in your No. 183 (the *Loa*), which was loaded with concealed dynamite, comes within the description of cases mentioned the Department has not the requisite data to determine. It is sufficiently obvious that this practice must be fraught with danger to neutral vessels entitled to protection under the law of nations, and that in case American vessels are injured thereby this Government can do no less than hold the government of Peru responsible for any damage which may be thus occasioned.

"There is no disposition on the part of this Government to act in anywise nor in any spirit which may be construed as unnecessarily critical of the methods whereby Peru seeks to protect her life or territory against any enemy whatsoever, but it will appear, I think, to the high sense of propriety which has in times past distinguished the councils of the Peruvian Government, and which without doubt still abides therein, that in case it is ascertained that means and ways so dangerous to neutrals as those adverted to have been for any reason suffered to be adopted by her forces, or any part of them, they should be at once checked, not only for the benefit of Peru, but in the interest of a wise and chivalrous warfare, which should constantly afford to neutral powers the highest possible consideration."[1]

Mr. Christiancy, replying to this communication on March 8, 1881, said:

"I will say that there never has been any real danger to neutral vessels from the cause mentioned, so far as I know or have been informed. But three instances have occurred during the war (so far as I have ever heard) which could by any possible latitude of construction come within the grounds of complaint mentioned. * * No complaint was ever made or suggested to me on behalf of any merchant vessel of the United States, nor any of our naval vessels on this score."

This case did not, therefore, become a precedent.

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[1] For. Rel., 1881, p. 857.

Methods used during the Franco-Chinese difficulties.— On July 2, 1886, Mr. Bayard, writing to Mr. Denby, at the time of the Franco-Chinese difficulties, said in regard to obstructions to neutral shipping:

"It is unquestionable that a belligerent may, during war, place obstructions in the channel of a belligerent port, for the purpose of excluding vessels of the other belligerent which seek the port either as hostile cruisers or as blockade runners. This was done by the Dutch when attacked by Spain in the time of Philip II; by England when attacked by the Dutch in the time of Charles II; by the United States when attacked by Great Britain in the Revolutionary war and in the war of 1812; by the United States during the late civil war; by Russia at the siege of Sebastopol, and by Germany during the Franco-German war of 1870."[1]

The commander in chief of the military district of Odessa, in April, 1877, declared that passage of harbors in that region would be allowed only under strict regulations, as they were barred by mines.

The introduction of obstacles, whether by sinking of stones, vessels, or other materials in harbors has been of not infrequent occurrence. This has often met with protest from neutrals, but even where the obstacles were most serious the protests have not been heeded to the extent of discontinuing undertakings which were distinctly aimed at the enemy, and which would take effect within the belligerent jurisdiction. In the case of the obstructions in the Canton River in 1884, though the United States had a treaty provision allowing freedom of entrance even in war, the Secretary of State only went so far as to say:

"Even, however, under the favorable modification, the leaving of a 150-foot channel, the obstruction to the channel at Canton and Whampoa can only be tolerated as a temporary measure, to be removed as soon as the special occasion therefor shall have passed, and under no circumstances to be admitted as a precedent for setting obstacles to open navigation at the treaty ports in

[1] For. Rel., 1886, p. 95.

time of peace under pretext of being intended for ultimate strategic defense in contingency of future war."[1]

Mr. Frelinghuysen, in a telegram to Mr. Young, January 22, 1884, said:

"No protest can be made against China for taking such steps for its defense as it may deem necessary."

Rivier[2] allows the obstruction of harbors against blockading forces under the necessities of war, actual or imminent.

General principles.—As a general principle neutrals have a right to carry on commerce in the time of war.

According to Bonfils[3] the problem then becomes one of "taking into consideration the respective rights of belligerents to place their opponent beyond the power of resistance, but respecting the liberty and independence of the neutral in doing this; rights of the neutrals to maintain with each of the belligerents free commercial relations, without injury to the opponent of either."

It is admitted, in theory and in practice, that a belligerent may use submarine boats, mines, torpedoes, and may place obstructions in the channel "for the purpose of excluding the vessels of the other belligerent" from a harbor.

In recent wars some time has been allowed for ships to load and depart from blockaded ports when they chance to find themselves in such ports at the proclamation of hostilities. This time varies. In the recent Spanish-American war Spain, in royal decree of April 23, 1898, Article II, said:

"A term of five days from the date of the publication of the present royal decree in the Madrid Gazette is allowed to all United States ships anchored in Spanish ports, during which they are at liberty to depart."

The proclamation of the United States, of April 22, 1898, said:

"Neutral vessels lying in any of said ports (those proclaimed blockaded) at the time of the establishment of such blockade will be allowed thirty days to issue therefrom."

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[1] For. Rel., 1884, Frelinghuysen to Young, April 18, 1884.

[2] Droit du Gens, II, p. 292.

[3] Droit Int. Pub., sec. 1494 ff.

Neither of these declarations put the belligerents under any obligations toward such vessels if they remain a longer time in the blockaded port.

It is properly held that vessels that remain in port after the time specified for their departure or enter the port after knowledge of hostilities are not entitled to special protection. Such vessels would not be in the port ordinarily without the hope of an exceptional reward for the unusual risks, and this being the case the belligerent is not bound to guard them against such risks as they may incur by coming within the field where the belligerent is carrying on legitimate hostilities made necessary by the exigencies of war. The presence of neutral shipping within a port which is duly blockaded in the time of war will not prevent a belligerent from pursuing the general objects of war.

Article I of the Naval War Code of the United States states that: "The general object of war is to procure the complete submission of the enemy at the earliest possible period, with the least expenditure of life and property," and of the objects of maritime war "to aid and assist military operations on land, and to protect and defend the national territory, property, and sea-borne commerce."

Article II provides that: "The area of maritime warfare comprises the high seas or other waters that are under no jurisdiction, and the territorial waters of the belligerents."

Article III provides that: "Military necessity permits measures that are indispensable for securing the ends of the war and that are in accordance with modern laws and usages of war."

It does not permit wanton devastation, the use of poison, or the doing of any hostile act that would make the return to peace unnecessarily difficult.

Noncombatants are to be spared in person and property during hostilities, as much as the necessities of war and the conduct of such noncombatants will permit.

In the case under consideration there is no doubt that the elements necessary for a state of blockade are present. There is a state of war, the place is susceptible of

blockade and is blockaded and the neutrals have ample evidence of the fact.

The proclamations of blockade do not give to the neutrals any guarantees, but only the permit to remain within the blockaded port or ports a certain time under certain conditions.

The object of war being the submission of the enemy, the area of legitimate warfare covering the port in question, military necessity permitting such measures as accord with the laws of war, and it being necessary to spare the person and property of noncombatants as far as the conditions will permit, it is evident that neutrals within belligerent jurisdiction, whether before the expiration of the time allowed for their departure or after that time, may be liable to certain consequences.

Halleck[1] says:

"States, not parties to a war, have not only the right to remain neutral during its continuance, but to do so conduces greatly to their advantage, as they thereby preserve to their citizens the blessings of peace and commerce. Moreover, the belligerents are interested in maintaining the just rights of neutrals, as the trade and intercourse kept up by them greatly contribute to mitigate the evils of war. It has, therefore, become an established principle of international law that neutrals shall be permitted to carry on their accustomed trade with such restrictions only as are necessary for the security of the established rights of the belligerents."

Hall[2] says:

"A neutral individual in belligerent territory must be prepared for the risks of war and can not demand compensation for the loss or damage of property resulting from military operations carried on in a legitimate manner."

In some instances the "belligerents" exercise the so-called right of using or destroying neutral property on the plea of necessity, giving compensation. "This practice is called 'angary' or 'prestation' and is by

[1] Int. Law, Vol. II, p. 143. [2] Int. Law, 4th ed., p. 743.

most jurists either condemned or regarded with disfavor. An illustration is the sinking, during the Franco-Prussian war of 1870, by the Germans, of several British merchant ships in the Seine to prevent gunboats from going up the river. During the same war the Germans seized in Alsace, for military purposes, certain railway carriages of the Central Swiss Railway and certain Austrian rolling stock, all of which remained in the possession of the Germans for some time." For this the Naval War Code of the United States provides, Article VI:

"If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed."

It would then appear that the absolute seizure of neutral property for the purpose of using it for carrying on the war would not be allowed except in extreme cases for full recompense.

The case under consideration is one between the condition of absolute immunity from the consequence of war and the condition warranting appropriation for which compensation can be demanded.

Of this position Hall[1] says:

"As a state possesses jurisdiction, within the limits which have been indicated, over the persons and property of foreigners found upon its land and waters, the persons and property of neutral individuals in a belligerent state are in principle subjected to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the state as the existence of hostilities may render necessary, provided that no further burden is placed upon foreigners than is imposed upon subjects.

"So, also, as neutral individuals within an enemy state are subject to the jurisdiction of that enemy, and are so far intimately associated with him that they can not be separated from him for many purposes, they and their property are as a general principle exposed to the

[1] Int. Law, 4th ed., p. 764.

same extent as noncombatant enemy subjects to the consequences of hostilities."

Of the vessels of the United States in question within the port it may be said: "The general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of the state is clear and indisputable; and no objection can be made to its effects upon property which is associated either permanently or for a considerable time with the belligerent territory."

The neutral merchant ships are liable to the consequences of legitimate hostilities.

Conclusions.—In reply to the question, "How should the commander act, and on what grounds?"

It would be safe to say that the commander could make no demands upon the belligerent, nor could he make any protest, though he might request delay sufficient to assist in placing the neutral shipping under the flag of the United States in a position as safe as possible considering the military necessity. The commander of the United States war vessel should take the position of trying to aid the vessels of his countrymen by helping them to avoid danger, rather than that of impeding the action of the belligerent within whose port he finds himself.

The belligerent within whose port the vessels of the United States are is bound to regard the safety of neutral vessels in carrying on hostile operations as far as the necessities of war permit.

It is evident that while the obligations of neutrals to belligerents has received much attention, the consideration of belligerent obligations to neutrals has received far less definition than its importance deserves.

SITUATION VI.

Insurgents in state A, with which the United States has full international relations, proclaim and maintain a blockade of a port occupied by state A. The captain of an American merchant ship complains to the commander of an approaching United States war ship that he can not enter port without incurring risk of the penalties for violation of blockade and desires the assistance of the United States war ship in entering the port on the ground that no war exists in state A, and he is therefore entitled by treaty and on general principles to enter this port.

What position should the commander assume?

How far is the commander of the merchant ship correct in his contentions?

SOLUTION.

The commander of the United States war ship should assume the position that, in general, naval officers of the United States will permit no interference with ordinary commerce of the United States, unless they are duly instructed by their Government. (The above position should be considered with reference to the conclusions set forth on page 74.)

The captain of the merchant vessel is correct in his claim in regard to general principles, and most treaties secure commercial freedom.

NOTES ON SITUATION VI.

PREVENTION OF ENTRY OF NEUTRAL COMMERCE BY INSURGENTS.

Definition of blockade.—The simple enumerated clauses of the Declaration of Paris, 1856, of which the fourth is applicable to blockades, viz: "Blockades in order to be binding must be effective; that is to say, maintained by force sufficient really to prevent access to the coast of the enemy," are often quoted as though these

were principles always applicable. There were prior clauses indicating under what circumstances these laws were applicable as, "Considering: That maritime law in time of war has long been the subject of deplorable disputes; that the uncertainty of the law and of the duties in such a matter give rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts," etc. These show distinctly that blockade as viewed in this declaration was a war measure.

In the Naval War College Manual of International Law, page 151, blockade is defined: "A blockade being an operation of war, any government, independent or *de facto*, whose rights as a belligerent are recognized, can institute it as an exercise of those rights."

Hall[1] says: "Blockade consists in the interception by a belligerent of access to a territory or a place which is in the possession of his enemy." This implies the three conditions:[2]

"1. The belligerent must intend to institute it as a distinct and substantive measure of war, and his intention must have in some way been brought to the knowledge of the neutrals affected.

"2. It must have been initiated under sufficient authority.

"3. It must be maintained by a sufficient and properly disposed force."

Dahlgren[3] defines blockade as follows:

"The word blockade properly denotes obstructing the passage into or from a place on either element, but is more especially applied to naval forces preventing communication by water. With blockades by land, or ordinary sieges, neutrals have usually little to do."

Walker says:[4]

"*The blockade must have been established under the sanction of sufficient authority.* A blockade to be legally binding must be a state measure. It may be a

[1] Hall, sec. 257, p. 718.
[2] Ibid., p. 719.
[3] Dahlgren, p. 26.
[4] Science of Int. Law, p. 519.

direct state measure instituted under formal ministerial notice, or by an officer in pursuance of special instructions from his government, or it may be but indirectly a state measure being established *de facto* by a belligerent commander in the exercise of the general powers ordinarily committed to him. But in this last case, as, for example, when the naval commander on a distant station institutes a blockade without awaiting the prior express authorization of his home authorities, the neutral trader can only be injuriously affected if the action of the officer be subsequently formally adopted by his government."

Dana, in a note to Wheaton's International Law,[1] takes a more extreme position than is now generally accepted in regard to piracy. In speaking of the case where the insurgents and parent state are maritime he says:

"If the contest is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct. If it is not a war they are to follow a totally different line. If it is a war, the commissioned cruisers of both sides may stop, search, and capture the foreign merchant vessel, and that vessel must make no resistance and must submit to adjudication by a prize court. If it *is not* a war the cruisers of neither party can stop or search the foreign merchant vessel, and that vessel may resist all attempts in that direction, and the ships of war of the foreign state may attack and capture any cruiser persisting in the attempt. If it is war, foreign nations must await the adjudication of prize tribunals. If it is not war no such tribunal can be opened. If it is a war, the parent state may institute a blockade *jure gentium* of the insurgents' ports which foreigners must respect; but if it is not a war, foreign nations having large commercial intercourse with the country will not respect a closing of insurgent ports by paper decrees only. If it is a war, the insurgent cruisers are to be treated by foreign citizens and officials at sea and in port as lawful belligerents. If it is not a war, those cruisers are pirates and may be treated as such."

[1] Note 15, p. 35.

Boyd, in his note to Wheaton, 510*a*, says: "The law of blockade, like that of contraband is a compromise between the conflicting rights of belligerents and neutrals."

Rivier[1] says: "The ships of a state are alone competent to blockade."

Martens[2] says: "Maritime blockade can be established only by the supreme authority of a belligerent state."

Despagnet[3] asserts that blockade is possible only after a declaration of war, and that blockade in civil wars is not in principle effective against neutrals, who are bound to respect only international hostilities properly so called.

Bluntschli[4] maintains that the decree of a blockade is a governmental act.

Phillimore[5] says:

"A blockade is a high act of sovereign power; it is a right of a very severe nature, operating lawfully but often harshly, upon neutrals, and therefore not to be aggravated or extended by construction.

"Sec. 299. It will be seen that there is no act by which a neutral more clearly and deservedly forfeits the immunities of his national character than by violation of a belligerent blockade."

It may be concluded that blockade by reasonable interpretation is a war measure permitted only to belligerents who are accorded other belligerent rights, and that it can be declared and executed by such competent belligerents only.

That parties entitled to establish blockade must be entitled to rights of belligerents is further evident from the consequences of a blockade as regards both ship and cargo. The ship may be confiscated if guilty of violation of the blockade. The cargo is confiscated if belonging to the owners of the ship or directly associated in its guilt.

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[1] Droit du Gens, II, p. 289.
[2] F. de, Droit Int., III, p. 288.
[3] Droit Int., p. 635, sec. 620.
[4] Sec. 831, 1.
[5] 2d ed., III, sec. 288.

This confiscation should take place only after proper evidence of guilt, which in case of so-called blockade by insurgents not having belligerents status is at least very difficult of proof.

On the other hand, it has been held that: "Ships armed by factions opposed to the constituted government and not recognized as belligerents lack all representative character; they may be taken on the high sea or in the waters of their former state when they violate the law of nations to the injury of third states or their citizens."[1]

In 1885, April 21, Mr. Wharton, Solicitor for the Department of State, enunciated the following:

"When vessels belonging to citizens of the United States have been seized and are now navigated on the high seas by persons not representing any government or belligerent power recognized by the United States, such vessels may be captured and rescued by their owners, or by the United States cruisers acting for such owners; and all force which is necessary for such purpose may be used to make the capture effectual."

The United States Revised Statutes, sec. 4295, provides:

"The commander and crew of any merchant vessel of the United States owned wholly or in part by a citizen thereof may oppose and defend against any aggression, search, restraint, depredation or seizure which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States."

This section of the Revised Statutes makes it lawful for a private vessel to resist the aggression of an insurgent not yet recognized as a belligerent.

The opinion of the court is that:

"To justify the exercise of the right of blockade, and legalize the capture of a neutral vessel for violating it,

[1] Calvo, Droit Int., sec. 501.

a state of actual war must exist, and the neutral must have knowledge or notice that it is the intention of one belligerent to blockade the ports of the other. To create the right of blockade, and other belligerent rights, as of capture, as against neutrals, it is not necessary that the party claiming them should be at war with a separate and independent power; the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms. A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war." [1]

It would seem from the concensus of authorities that blockade is strictly a war measure; that blockade implies the existence of belligerents and neutrals; that blockade is a measure of such grave consequences to the neutral that it should be allowed only under circumstances admitting of no doubt of the propriety of the action; that the generally accepted rule that a blockade to be binding must be effective, applies only to blockades properly instituted in the time of war; and that the earlier action the United States has been to disregard action of the nature of an insurgent blockade.

This would lead to the opinion that from authorities and general principles, as from the earlier practice of the United States, an insurgent blockade, as in the situation proposed, should not be regarded.

ATTITUDE TOWARD INSURGENCY.

(*a*) *English.*—T. J. Lawrence, in [2] 1897, said:

"In each [case] a group of powers planned and carried out concerted action with regard to both the parties in a maritime struggle between an established government and a revolted fleet acting in the interest of insurgents whose belligerency was not recognized. Any deductions we may be able to draw from their proceedings have,

[1] The Prize Cases, 3 Black., 635; 3 Whart. Dig., p. 362.

[2] Journal of the Royal United Service Institution, Vol. XLI, pt. 1, p. 14.

therefore, a greater authority than conclusions based upon the action of one or two states only.

"In January, 1891, a few days after the commencement of the revolt of the Congressional party in Chile, the diplomatic representatives of Great Britain, Germany, France, and the United States met the Chilean minister for foreign affairs. They agreed that the blockade of Valparaiso and Iquique, notified by the revolted fleet, was illegal, and instructed their consuls in the two ports to protest against it. This was done, and the protests were backed up by the concentration of a considerable number of neutral men-of-war in Chilean waters, the strongest force being the British squadron under Rear Admiral Hotham. The insurgents were careful to conciliate neutral opinion. They committed few violent acts against British shipping. Their blockades were not enforced against foreign vessels; and in February, 1891, at the instance of Rear Admiral Hotham, their naval commanders were instructed by the proper officer of their government that 'it is absolutely necessary to respect foreign interests, and to limit our vigilance in ships under a foreign flag solely to articles which are contraband of war.' This reservation of a right to capture contraband goods seems to have been acquiesed in by the British commander and the other neutral representatives. Rear Admiral Hotham contented himself with pointing out that cargoes of coal and provisions *bona fide* consigned to noncombatants could not be considered contraband of war. He added that 'any seizure or detention of vessels carrying such cargoes is a gross breach of their neutral rights,' thus admitting by implication the legality of the capture of neutral vessels laden with goods undoubtedly contraband. I can not, however, understand on what principle a blockade can be held to be unlawful, while the seizure of contraband of war is lawful. Both operations are permitted to regular belligerents. The right to perform them is given by war, and by war alone. Neutrals are not bound to submit to either if there is no war in the full legal sense of the word. The distinction drawn between them seems to point to some confusion of ideas on the part of the

British Foreign Office. I can not help thinking that it was not fully prepared for the problems which suddenly confronted it at this time; and I am confirmed in this view by finding a brief note to Messrs. Smith & Service, sent at the beginning of the insurrection. It runs thus: 'Assuming effective blockade to exist, escort through it can not be given.' One ought not, perhaps, to lay much stress upon a telegraphic dispatch, forwarded in haste to meet an emergency; but certainly the words I have quoted appear to indicate that Great Britain was at that moment prepared to recognize the insurgent blockades, provided only they were effective. If that be so, she changed her mind very quickly, and I can not help thinking that in this case second thoughts were best. In other matters the theory was maintained that neutral powers had no concern with domestic disturbances and would not permit the exercise of warlike operations against their subjects. We declined to accept the Chilean Government's declaration of nonresponsibility for the acts of the insurgent fleet. We refused to recognize the validity of the decree whereby it closed ports in the effective possession of the insurgents, or to allow it to exact a second time from British vessels export duties which had been already paid to insurgent authorities in possession of the port of export. We declared we should hold it responsible for any loss that might fall upon British subjects if it carried out its proposed policy of destroying the nitrate factories, and we declined to put the foreign enlistment act into force in our ports. Further, it may be noted that in this case, as in all others, communications between neutral powers and the rebel leaders were made through the consuls and naval or military officers of the former, and not through their diplomatic representatives.

"The next and last case need not detain us long. It commenced in September, 1893, and lasted till March, 1894. During these seven months the greater part of the Brazilian fleet was in rebellion against the established government. Under Admirals de Mello and da Gama it occupied the inner harbor of Rio de Janeiro, and kept up an artillery duel with the forts and batteries

that remained faithful to the regular authorities. As soon as the insurrection commenced the various foreign legations concerted measures to keep open trade and prevent a bombardment. On October 2, 1893, De Mello was informed by the commanders of the English, American, French, Italian, and Portuguese naval forces before Rio that they would resist, by force if needful, any attack on the city; and the diplomatic representatives of the powers in question requested the government to refrain from fortifying the inhabited and commercial quarters. Thus the insurgent admiral was to be deprived of any pretext for attack, and a sort of *modus vivendi* would be established. This was done, and in the course of the diplomatic correspondence on the subject the foreign representatives disclaimed all design of interfering in the internal affairs of Brazil, and declared that their action would be limited to 'the necessity of protecting the general interests of humanity and the lives and property of their countrymen.' On the whole, these limitations were observed. Anything like a general bombardment of Rio de Janeiro was prevented. . Neutral merchantmen were protected while loading and unloading, and, on one occasion, after an American boat had been fired upon by an insurgent vessel, the American admiral, Benham, returned the fire from the *Detroit.* After this occurrence the insurgents became more careful. The principles which should guide foreign powers in such cases were laid down in a dispatch of January 11, 1894, from the late Judge Gresham, then Secretary of State in President Cleveland's Cabinet, to Mr. Thompson, the American minister at Rio. The views therein expressed are, with one exception, so sound that I make no apology for quoting them. The American statesman wrote: 'An actual condition of hostilities existing, this Government has no desire to restrict the operations of either party at the expense of its effective conduct of systematic measures against the other. Our principal and obvious duty, apart from neutrality, is to guard against needless * * * interference * * * with the innocent and legitimate neutral interests of our citizens. Interruption of their commerce can be respected

as a matter of right only when it takes two shapes—either by so conducting offensive and defensive operations as to make it impossible to carry on commerce in the line of regular fire, or by resort to the expedient of an announced and effective blockade.' The exception to the general soundness of these views is to be found in the last clause. A fleet of irresponsible sea rovers has no right to establish a blockade against foreign vessels. The more effective the blockade, the worse is the outrage. None but recognized belligerents in a regular war can exercise belligerent rights against neutral commerce.

"We are now in a position to sum up the results of a long inquiry. Much uncertainty has been felt as to the rights and duties of neutral powers toward a maritime force whose belligerency has not been recognized. The rules of international law are deduced from the practice of states, and in this matter practice has not been quite uniform or consistent. Considerations connected with piracy have been allowed to intrude into the question and darken its solution. But recent cases show a tendency toward the adoption of rules and principles which only require to be clearly stated and divested of extraneous matter in order to meet with general acceptance. A state can not rid itself of responsibility for the acts of its rebel cruisers by proclaiming them pirates. Such a proclamation has no international validity. All it can do is to alter the status of the vessels according to the municipal law of the country to which they belong. Foreigners must regulate their conduct toward such vessels without reference to a purely domestic question. If the ships in question attempt to establish blockades against neutral commerce, or bombard neutral property, or molest neutral vessels pursuing their lawful avocations on the high seas or in the territorial waters which are the scene of conflict, the injured neutral may proceed against them directly, and use what force is necessary to compel them to desist. It knows three things: There is no war; its subjects have been treated as if there were war; those who have inflicted this treatment have no recognized government behind them to be answerable for their misdeeds. Under

such circumstances, it simply says to the parties concerned: 'Fight out your own quarrel with your own countrymen. With that I have no concern. But, unless and until you receive recognition as lawful belligerents, I will not submit to the exercise of belligerent rights against my subjects or my sea-borne commerce.' This is an intelligible rule. It rests upon admitted principles, and is a sure guide in practice. Moreover, it has the further advantage of avoiding all questions connected with piracy and limiting the action of the aggrieved power to what is necessary for the protection of its own interests. The injured neutral strikes directly at the offender, just as it does when the ship of a recognized belligerent attempts to make a capture in one of its ports. Force would be used then, though the peccant vessel would not be in the position of an authorized depredator. Much more, therefore, may it be used against ships which bear the commission of no recognized authorities. But in neither case does the use of it imply a pronouncement upon technicalities connected with the exact position in international law of the vessel attacked. If it be objected that there is no middle term between a belligerent and a pirate, and that a ship engaged in acts of depredation at sea must be the latter when it is not the former, I reply that the cases collected in this paper point to a condition midway between the two."

For this position between belligerency and piracy Mr. Lawrence would approve the term *insurgency*. The English view as expressed by Mr. Lawrence has met with general approval.

(*b*) *United States in recent years.*—Recently the United States has not hesitated to admit the existence of insurgency without acknowledging belligerency.

The proclamation issued by President Cleveland, June 12, 1895, announces that the island of Cuba was the "seat of serious civil disturbances accompanied by armed resistance to the authority of the established government of Spain." In his annual message, December 2, 1895, President Cleveland says:

"Cuba is gravely disturbed. An insurrection, in some respects more active than the last preceding revolt,

which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast * * * this flagrant state of hostility * * * has entailed earnest effort on the part of this Government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty."

In the case of the *Three Friends*, the Supreme Court of the United States regarded such admission as sufficient basis for action, stating: "We are thus judicially informed of the existence of an actual conflict of arms in resistance of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place."

It was held that this acknowledged status of insurgency brought into operation the domestic laws of neutrality.

In the case of Underhill *v.* Hermandez[1] Chief Justice Fuller held[2] that:

"Revolutions or insurrections may inconvenience other nations but by accommodation to the facts the application of settled rules is readily reached. And where the fact of the existence of war is in issue in the resistance of complaint of acts committed within foreign territory, it is not absolute prerequisite that the fact should be made out by an acknowledgment of belligerency as other recognition may be sufficient proof thereof."

The United States admits that the existence of an insurrection brings into operation under certain circumstances the neutrality laws and that insurrections may cause inconvenience to other nations. There is, however, a limit to the amount of inconvenience and sacrifice which a foreign state may be called upon by the legal state to undergo during an insurrection.

"The legitimate government of the state in which the insurrection exists can not throw the burden of executing its decrees upon a foreign state. This has been

[1] 168 U. S., 250. [2] Dec. 29, 1897.

recognized already in the case of decrees declaring insurgents outlaws, which have no effect in determining the relations of foreign states to the insurgents."

The position of Secretary Fish in the case of the insurgents against Haiti in 1869 was as follows:

"Regarding them simply as armed cruisers of insurgents not yet acknowledged by this Government to have attained belligerent rights, it is competent to the United States to deny and resist the exercise by those vessels or any other agents of the rebellion of the privileges which attend maritime war in respect to our citizens or their property entitled to our protection. We may or may not, at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense; or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders, not to depredate in a criminal sense and for private gain, but to capture and destroy *jure belli*. It is sufficient for the present purpose that the United States will not admit any commission or authority proceeding from the rebels as a justification or excuse for injury to persons or property entitled to the protection of this Government. They will not tolerate the search or stopping by cruisers in the rebel service of vessels of the United States, nor any other act which is only privileged by recognized belligerency."[1]

He also maintains the right to destroy rebel vessels making aggressions upon persons or property entitled to the protection of the United States.

The position of Admiral Benham in the Brazilian revolt of 1893–94 seems to be one justified by principles and reason: "that any movement on the part of the American merchant vessels during the continuance of actual hostile operations was at their own risk; but any attempt upon the part of the insurgents to prevent legitimate movements of our merchant vessels at other times was not to be permitted, and that all possible protection

[1] Wharton Dig., sec. 381.

was to be afforded such movements by the naval force of the United States assembled at Rio under his command."

The action of insurgents till the recognition of belligerency being domestic action, the foreign vessel is responsible only so far as it comes within the range of "actual hostile operations."

In the Haitien revolt of 1902 the United States took the ground that the importance of the world's commercial relations was too great to permit interference with such relations by parties engaged in domestic struggles in which one or both the contestants have no responsible status. Other important states concurred in the action taken by the United States. This stronger policy is not only conducive to the protection of the world's commerce, but also to the promotion of peace by discouraging uprisings which are entered upon because of the personal ambitions of party leaders rather than because of desires to reform and benefit the state.

During this Haitien insurrection of 1902 the commander of the U. S. S. *Machias* had under his protection the foreign commerce in that region. He informed the commander of the insurgent gunboat of his position on August 10, 1902, as follows:

"SIR: I wish to give you notice that I am charged with the protection of British, French, German, Italian, Spanish, Russian, and Cuban interests, as well as those of the United States. You are informed, also, that I am directed to prevent the bombardment of this city without due notice; also to prevent any interference with commerce by the interruption of telegraph cables or the stoppage of steamers engaged in innocent trade with a friendly power. All interference excepting with Haitien interests I shall endeavor to prevent."

United States Minister Powell telegraphed, "Gonaives Government not recognized. Killick can not declare blockade of port; inform him. Give your protection to any American, Cuban, or foreign vessel that desires to enter cape." While, of course, the naval officer was in no way bound by this telegram of the minister, as the commander is responsible only to his own Department

for his action, yet this telegram would be taken as evidence of the attitude of the Department of State.

Later the commander of the U. S. S. *Machias* informed Killick, the commander of the insurgent gunboat, that "until belligerent rights are accorded you, no right to visit or search any foreign vessel is permitted." With this position the representatives of other states agreed.

The German gunboat *Panther* took a positive position in demanding, on September 6, 1902, the surrender of the insurrectionist gunboat *Crête-à-Pierrot*, which had, on September 2, taken possession of the munitions of war that were on the way to the provisional government of Haiti on the German merchant steamer *Markomannia*. The insurgent gunboat was set on fire before the surrender was made. The Germans, seeing this, opened fire upon the *Crête-à-Pierrot* and completed its destruction. This action further manifests the disposition of the states having important commercial interests not to submit to interference with commerce by insurgents who have not acquired belligerent status.

The drift of practice on the part of the United States has been toward a considerable leniency in dealing with those in revolt against constituted authorities. "It may be said that there has been a growing tendency to admit a hostile status short of belligerency of which it may be expedient for a state to take cognizance at a time when it is not expedient to recognize belligerency, that the actions of the party hostile to the parent state are not those of outlaws, and that the practice of the United States is to admit this hostile status as one affecting the operation of its domestic laws and changing the relations of its servants toward the parties to the conflict."

General attitude toward insurgency.—It may now be said that insurgency is often regarded as a fact which in a manner varying according to circumstances is accepted in international practice. "The admission of this fact is by such domestic means as may seem expedient. This admission is made with the object of bringing to the knowledge of citizens, subjects, and officers of the state such facts and conditions as may enable them to act properly. In the parent state the

method of conducting the hostilities may be a sufficient act of admission, and in a foreign state the enforcement of a neutrality law. The admission of insurgency by a foreign state is a domestic act which can give no offense to the parent state, as might be the case in the recognition of belligerency. Insurgency is not a crime from the point of view of international law. A status of insurgency may entitle the insurgents to freedom of action in lines of hostile conflict which would not otherwise be accorded, as was seen in Brazil in 1894, and in Chile in 1891. It is a status of potential belligerency which a state, for the purpose of domestic order, is obliged to cognize. The admission of insurgency does not place the foreign state under new internal obligations as would the recognition of belligerency, though it may make the execution of its domestic laws more burdensome. It admits the fact of hostilities without any intimation as to their extent, issue, righteousness, etc. * * * The admission of insurgency is the admission of an easily discovered fact. The recognition of belligerency involves not only a recognition of a fact, but also questions of policy touching many other considerations than those consequent upon the simple existence of hostilities." [1]

The fact that insurgents have not enforced, against other than the vessels of the state to which they were opposed, the blockade which they had proclaimed is seen in the cases which have arisen.

The right of insurgents to make captures of vessels not belonging to the parent state has not been recognized.

The cases of Chile and Brazil are not sufficiently in harmony to warrant a precedent of recognition of insurgent blockade.

The possible putting into operation of domestic neutrality laws has no effect in determining action in foreign waters.

The acknowledgment by a neutral of full right to blockade on the part of insurgents not yet recognized as belligerents is a questionable act as regards the parent state.

Blockade, from its consequences, should be reserved as far as possible within the laws of war for the status of full belligerency.

[1] Wilson, Insurgency, p. 16, Lectures, Naval War College, 1900.

The status of insurgents is too indefinite to permit them to freely use against neutrals the extreme measure of blockade, and the consequent rights of visit, search, etc.

Insurgents, unless they have obtained a status entitling them to be recognized as belligerents, would not have any prize courts acting upon sufficient authority to warrant third parties in allowing to them the right to inflict the penalties of violation of blockade.

They have been permitted to seize, after making compensation, articles contraband on foreign vessels which they may approach. This act, open to most serious question, does not, however, imply a right to seize and confiscate ship and cargo for violation of blockade.

The position enunciated by Snow[1] is correct: "As to the position of insurgents in general, it is agreed that they have no belligerent rights. Their war vessels are not received in foreign ports, they can not establish a blockade which third powers will respect, and they must not interfere directly with the commerce of third states."

Conclusions of the Institute of International Law.— Many of the above and other considerations were discussed by the Institute of International Law in its session of September, 1901, when it adopted the following resolutions:

"Art. 5, Sec. 1. Une tierce puissance n'est pas tenue de reconnaître aux insurgés la qualité de belligérants, par cela seul qu'elle leur est attribuée par le gouvernement du pays ou la guerre civile a éclaté.

"Sec. 2. Tant qu'elle n'aura pas reconnu elle-même la belligérance, elle n'est pas tenue de respecter les blocus établis pas les insurgés sur les portions du littoral occupées par le gouvernement régulier." [2]

"Art. 3. L'obligation du dédommagement disparait, lorsque les personnes lésées sont elles-mêmes cause de l'événement qui a entraîné le dommage. Il n'existe pas, notamment, d'obligation d'indemniser ceux qui sont rentrés dans le pays en contrevenant a un arrêté d'expulsion, ni ceux qui se rendent dans un pays ou veulent s'y livrer au commerce ou à l'industrie, alors qu'ils

[1] Int. Law, 2d ed., p. 12. [2] Quartrieme Commission.

savent ou ont dû savoir que des troubles y ont éclaté, non plus que ceux qui s'etablissent ou séjournent dans une contrée ne présentant aucune sécurité par suite de la présence de tribus sauvages, à moins que le gouvernement du pays n'ait donné aux immigrants des assurances particulières."[1]

These resolutions show that the opinion of the authorities on international law is that third powers who have not recognized the belligerency of those in revolt against a constituted state are not under obligation to respect a so-called blockade established by such insurgents. The Institute admits, however, that a third power may not obtain damages for injuries which its subjects bring upon themselves. This position would agree with the position taken by Admiral Benham at Rio de Janeiro. This position as a whole seems to accord with the best opinion and with practice and is at the same time easily understood.

Conclusions.—1. Blockade is a war measure and should be reserved for a state of war between responsible belligerents.

2. The precedents allowing certain interference with the commerce of states not concerned in insurrections has been based rather on policy and convenience than upon principles of international law. Even this interference must be in pursuance of orderly military operations, and commerce must not "be at the mercy of every petty contest carried on by irresponsible insurgents and marauders under the name of war."

3. Insurgents can not be allowed to establish a blockade binding on foreign states because the status of insurgents is uncertain and the enforcement of blockade involves the establishment of prize courts and the exercise of extreme measures which can be allowed by foreign states only after belligerency has been recognized.

4. Insurgents should not be allowed to establish blockades because the growing importance of the world's commerce demands that for the well-being of mankind commerce should be in the fullest degree free, and that interference with it should be tolerated only after due

[1] Neuvieme Commission.

notice of a contest of sufficient magnitude to constitute belligerency.

5. The Institute of International Law at its session in 1901 declared that a third state which has not itself recognized the belligerency, is not bound to respect blockades established by insurgents upon portions of the coast occupied by the regular government.

6. Public officials abroad, as of the State and Navy Departments, are entitled to instructions sufficiently definite to guide them in case of interference with foreign commerce by insurgents as the precedents and interpretations have been varied and confusing.

NOTE.—In accordance with the sixth item of these conclusions, the Department of State, in a letter of November 15, 1902 (which see below), set forth clearly the attitude of that Department upon the so-called "insurgent blockade." The correspondence relative to this matter is herewith.

[Copy.]

NAVAL WAR COLLEGE,
Newport, R. I., November 7, 1902.

SIR: 1. I beg to lay before the Department certain suggestions respecting interference with commerce by insurgent vessels, which are in condensed form the outcome of the discussions upon this subject at the War College during the past summer. It is felt generally by naval officers that the subject is in a very unsatisfactory and indefinite status, and these suggestions are respectfully offered as forming a basis of action. They have been prepared, at the request of the College, by Prof. George Grafton Wilson, who was in charge of the subject of international law this last summer at the College. The full discussion of the subject at the College will shortly be in print as part of the "International Law Situations, with Solutions and Notes," of the present year, so that I shall not enter upon a discussion of the subject here.

2. I inclose also Professor Wilson's letter to myself, which is explanatory of his paper.

3. I would add that I believe these instructions to be in accord with the views of Dr. John Bassett Moore and Mr. Adee, of the Department of State, both of whom are high authorities in the subject.

4. I would also add that the word "blockade," as used in Professor Wilson's paper, is in the strictly technical sense, as defined in the Declaration of Paris, April 16, 1856, and that the officers were unanimous in opinion that the use of the word "blockade" should be restricted to this technical meaning.

Very respectfully, F. E. CHADWICK,
Captain, U. S. N., President.

The SECRETARY OF THE NAVY,
Navy Department, Washington, D. C.
(Through Bureau of Navigation.)

[Copy.]

BROWN UNIVERSITY,
Providence, R. I., October 11, 1902.

Capt. F. E. CHADWICK, U. S. N.,
President Naval War College, Newport, R. I.

DEAR SIR: I inclose a statement in a brief form of the general reasons why there should be some understanding in regard to what has been unfortunately termed "insurgent blockade;" also a form for instructions which might be issued, and a résumé of the reasons why such instructions as those particularly mentioned might be issued. I think these cover the points upon which there was agreement among the officers and those which seem most important. These instructions will leave the Department at Washington to decide, except in the most unusual cases, what should be done. With the growing importance of our commerce some such definite stand entirely within the law and precedent is necessary.

The more extended treatment of this matter will appear in the solutions to the "Situations." If any conference is held on this matter, and it seems advisable to you, I will try to go into the subject more fully before the members.

Very truly yours,

GEORGE GRAFTON WILSON.

The limits of interference with the world's commerce permissible to insurgents not yet recognized as belligerents should be more clearly determined:

1. Because the importance of the world's commercial relations demands freedom only to be denied in the case of grave public necessity.

2. In order that insurgents, often irresponsible, may not unduly interfere with the commerce and rights of foreign citizens.

3. In order that public officials may not be misled by the lack of agreement in the precedents relating to the treatment of insurgents interfering with foreign commerce.

4. Particularly because frequently called upon to act when in the neighborhood of such insurrectionary movements, naval officers are entitled to instructions more definite than those now in force.

The following propositions are offered as bases for instructions:

1. Insurgents not recognized as belligerents have not the right to establish a blockade, nor have they the right to exercise in regard to the commerce of the United States any of the rights appertaining to the establishment of a blockade.

2. When insurgents actually have before a port of the state against which they are in insurrection a force sufficient, if belligerency already had been recognized, to maintain an effective blockade, the United States Government may admit that such insurgent force may prevent the entry of United States commerce.

3. The insurgents, even after such admission, may use against United States commerce *only* such force, however, as is necessary to prevent the entry of merchant vessels already notified by the officer of the insurgents before the port that the United States has admitted its closure by the insurgents, and force can be used only while such vessel is actually attempting to pass in or out of the port after such notification.

4. In general, the naval officers of the United States will permit no interference with ordinary commerce of

the United States unless they are duly instructed by their Government.

In regard to the proposition that insurgents have not the right to establish a blockade, it may be said that this is the position assumed by practically all the leading authorities on international law.

Blockade as defined by the Declaration of Paris, April 16, 1856, has often been cited as applicable to every attempt to prevent entry to a port. The clause thus used, "Blockade in order to be binding must be effective," was specifically made with reference to a state of war involving belligerents and neutrals and there was no thought that it would be extended to insurgents. The declaration states that it was made with the idea of introducing "into international relations fixed principles," because "that maritime law in the time of war has long been the subject of deplorable disputes," and "that the uncertainty of the law and of the duties in such a matter give rise to difference between neutrals and belligerents which may occasion serious difficulty and even conflicts."

Insurgents have not a status that would justify foreign states in allowing them to exercise the rights of visit, search, seizure, and other rights appertaining to the enforcement of a blockade. In general, responsible prize courts are necessary. Such courts insurgents not yet recognized as belligerents could hardly possess, and even if they did possess such courts their decrees would be of doubtful authority. The implication that insurgents may have any such rights should be most carefully avoided.

The Institute of International Law at its twentieth session, in September, 1901, adopted the following resolutions:

Art. 5, Sec. 1. Une tierce puissance n'est pas tenue de reconnaître aux insurgés la qualité de belligérants, par cela seul qu'elle leur est arrtibuée par le gouvernement du pays ou la guerre civile a éclaté.

Sec. 2. Tant qu'elle n'aura pas reconnu elle-même la belligérance, elle n'est pas tenue de respecter les blocus établis par les insurgés sur les portions du littoral occupées par le gouvernement régulier.

In practice the United States has never allowed insurgents to enforce against its commerce those rights which blockade in the proper sense would carry, and other states have often denied this right to insurgents. As was said in the case of the *Ambrose Light*, commerce must not "be at the mercy of every petty contest carried on by irresponsible insurgents under the name of war."

As the earliest and latest opinions agree and practice and reason support the position that insurgents have not the right to establish a blockade, it seems expedient that instructions be issued to this effect.

The aim of the remaining propositions is to permit the insurgents to exercise in regard to the commerce of the United States such power as this Government acknowledges that they actually possess and to exercise this power in a regular way with the minimum of damage to commerce and the least danger of injustice. These instructions would relieve the naval officer of the responsibility for the decision upon questions which should properly be decided by the Government.

The aim of these instructions, as a whole, is to allow to insurgents the exercise of that power which they actually possess and that *only*, without attributing to them any of those extreme powers and rights that might belong to recognized belligerents under similar circumstances.

[Copy.]

DEPARTMENT OF STATE,
Washington, D. C., November 15, 1902.

The HONORABLE
The SECRETARY OF THE NAVY.

SIR: I have the honor to acknowledge the receipt of the letter of the Acting Secretary of the Navy (346855 B), under date of November 12, inclosing copy of a letter from the president of the Naval War College containing certain suggestions respecting interference with commerce by insurgent vessels, and requesting my comments thereon.

While as a rule this Department is reluctant to express, of record, general opinions or comments upon questions

of a more or less academic character, the papers you submit to me, and particularly the statement prepared by Professor Wilson and submitted to Capt. F. E. Chadwick, may justify some general observations.

Cases involving assertion of the rights of insurgent "blockade" are necessarily exceptional, to be considered as governed by exigent circumstances rather than by doctrine.

In dealing with concrete cases arising within the official cognizance of the Department of State and embracing points of international law like those presented in Mr. Wilson's memorandum, this Department endeavors to interpret the consensus of international law authorities with due regard to the precise significance of the term "blockade."

Blockade of enemy ports is, in its strict sense, conceived to be a definite act of internationally responsible sovereign in the exercise of a right of belligerency. Its exercise involves the successive stages of, first, proclamation by a sovereign state of the purpose to enforce a blockade from an announced date. Such proclamation is entitled to respect by other sovereigns conditionally on the blockade proving effective. Second, warning of vessels approaching the blockaded port under circumstances preventing their having previous actual or presumptive knowledge of the international proclamation of blockade. Third, seizure of a vessel attempting to run the blockade. Fourth, adjudication of the question of good prize by a competent court of admiralty of the blockading sovereign.

Insurgent "blockade," on the other hand, is exceptional, being a function of hostility alone, and the right it involves is that of closure of avenues by which aid may reach the enemy.

In the case of an unrecognized insurgent, the foregoing conditions do not join. An insurgent power is not a sovereign maintaining equal relations with other sovereigns, so that an insurgent proclamation of blockade does not rest on the same footing as one issued by a recognized sovereign power. The seizure of a vessel attempting to run an insurgent blockade is not generally

followed by admiralty proceedings for condemnation as good prize, and if such proceedings were nominally resorted to a decree of the condemning court would lack the title to that international respect which is due from sovereign states to the judicial act of a sovereign. The judicial power being a coordinate branch of government, recognition of the government itself is a condition precedent to the recognition of the competency of its courts and the acceptance of their judgments as internationally valid.

To found a general right of insurgent blockade upon the recognition of belligerency of an insurgent by one or a few foreign powers would introduce an element of uncertainty. The scale on which hostilities are conducted by the insurgents must be considered. In point of fact, the insurgents may be in a physical position to make war against the titular authority as effectively as one sovereign could against another. Belligerency is a more or less notorious fact of which another government, whose commercial interests are affected by its existence, may take cognizance by proclaiming neutrality toward the contending parties, but such action does not of itself alter the relations of other governments which have not taken cognizance of the existence of hostilities. Recognition of insurgent belligerency could merely imply the acquiescence by the recognizing government in the insurgent seizure of shipping flying the flag of the recognizing state. It could certainly not *create* a right on the part of the insurgents to seize the shipping of a state which has not recognized their belligerency.

It seems important to discriminate between the claim of a belligerent to exercise quasi sovereign rights in accordance with the tenets of international law and the conduct of hostilities by an insurgent against the titular government.

The formal right of the sovereign extends to acts on the high seas, while an insurgent's right to cripple his enemy by any usual hostile means is essentially domestic within the territory of the titular sovereign whose authority is contested. To deny to an insurgent the

right to prevent the enemy from receiving material aid can not well be justified without denying the right of revolution. If foreign vessels carrying aid to the enemies of the insurgents are interfered with within the territorial limits, that is apparently a purely military act incident to the conduct of hostilities, and, like any other insurgent interference with foreign property within the theater of insurrection, is effected at the insurgent's risk.

To apply these observations to the four points presented in Professor Wilson's memorandum, I may remark:

1. Insurgents not yet recognized as possessing the attributes of full belligerency can not establish a blockade according to the definition of international law.

2. Insurgents actually having before the port of the state against which they are in insurrection a force sufficient, if belligerency had been recognized, to maintain an international law blockade, may not be materially able to enforce the conditions of a true blockade upon foreign vessels upon the high seas even though they be approaching the port. Within the territorial limits of the country, their right to prevent the access of supplies to their enemy is practically the same on water as on land—a defensive act in the line of hostility to the enemy.

3. There is no call for the Government of the United States to admit in advance the ability of the insurgents to close, within the territorial limits, avenues of access to their enemy. That is a question of fact to be dealt with as it arises. But in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters—their only right being, as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents. The question of the nature and

mode of the redress which may be open to the government of the injured foreigners in such a case hardly comes within the purview of your inquiry, but I may refer to the precedents heretofore established by this Government in enunciation of the right to recapture American vessels seized by insurgents.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

SITUATION VII.

Several powers, not including the United States, have united in proclaiming a pacific blockade of minor state K. A merchant vessel of the United States bound for a port of K approaches this port and is warned by a vessel representative of the blockading powers not to enter under penalty of violation of blockade. The captain of the merchant vessel appeals to the commander of a United States vessel of war to convoy him through, or in some other manner secure for his vessel entrance to the port.

What action should the commander take, and why?

SOLUTION.

The commander of the United States vessel of war should request of the commander of the forces maintaining the pacific blockade that the merchant vessel of the United States enter port K. If this is not permitted, he should inform the commander of the forces maintaining the pacific blockade that the United States does not acknowledge the right in time of peace to thus interrupt commerce of powers not concerned in the blockade, and he should give formal notice that the United States would hold the blockading states responsible.

NOTES ON SITUATION VII.

THE EFFECT OF PACIFIC BLOCKADE.

General opinions in regard to pacific blockade.—Theoretically, blockade of any kind is strictly a measure of war, but in spite of this theoretical position the practice of the last three-quarters of a century has seen the institution of no less than sixteen so-called blockades while there was formally a state of peace. These have been termed pacific blockades, and however objectionable such a term may be theoretically, the fact must be considered.

These pacific blockades have not shown a uniform practice in the relations between the parties to the blockade and those not concerned who, for convenience, may be called neutrals, though not properly so, as "neutrals" imply "belligerents," and therefore war.

Before 1850 the blockades called pacific generally treated all flags alike. The French at Formosa in 1884 endeavored to extend the field of operations so as to cover neutrals; so again, when France blockaded Menam in 1883, and in the case of the blockade of Crete by the powers in 1897, the inclination was to extend the application beyond the powers concerned.

The blockade of Greece in 1886 was distinctly aimed against the Greek flag.

The review of recent blockades undertaken directly for the advantage of the state initiating them, and not on the grounds of public policy, shows that these blockades undertaken on the narrower grounds have not been sanctioned in acting against third parties.

"It is now generally admitted, however, that neutral commerce is not to be disturbed during pacific blockades."[1]

"Neutrals would not to-day submit to the restrictions placed upon their trade by measures of blockade unless instituted in the prosecution of open declared war."[2]

Lord Granville wrote to Mr. Waddington, November 11, 1884, at the time of the so-called pacific blockade of Formosa:

"The contention of the French Government that a 'pacific blockade' confers on the blockading power the right to capture and condemn the ships of third nations for a breach of such a blockade is in conflict with well-established principles of international law."[3]

Thus the plan of France to use measures justifiable only in war was denied. If those blockading desire themselves to have the advantage of such rights as are conferred upon belligerents, they must become belligerents by instituting a state of war.

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[1] H. Taylor, Int. Pub. Law, 1901, p. 445.

[2] Glass, Marine Int. Law, Part IV, sec. 19.

[3] Par. Papers, France, No. 1, 1885.

Walker[1] says:

"It may be questioned whether, in its wider extension, pacific blockade must not justify itself rather as a mode of warfare limited in operation than as a means of redress falling short of war; for the operation of such a measure may extend either to subjects of the blockading and blockaded powers only, or to the vessels of all nations. If it be confined to subjects of the parties directly engaged, its legitimacy can hardly be matter for serious consideration. The less is justified in the greater, and the blockaded sovereign has it in his power either to free himself from the inconvenience by the grant of redress, or to resent it by the declaration of war.

"If, however, the trade of neutrals be affected by the blockade, those neutrals may well protest against interference with their traffic not fully and completely justifiable. For them such protest must be matter of policy. Pacific blockade may be, and doubtless is, the less of two evils; to refuse to recognize it may be to force the offended state to legalize its acts by instituting a regular blockade as a measure of war."

Bonfils summarizes the situation of the majority (Fauchille's edition of his "Droit International Public") when he says:

"Sec. 992. We think, with M. F. de Martens (t. III, p. 173), that the so-called pacific blockade can not be justified, either in the name of humanity or from the point of view of good sense. The catastrophe of Navarino shows that it may have a bloody ending. In time of peace, reprisals ought to injure only the state which provokes them. The pacific blockade can produce serious results only when neutral states are obliged to respect it. But there can be no question of neutrality, properly so called, in time of peace. No obligation, in the proper and juridical sense, can oblige third states to submit to the conditions of a pacific blockade. But under these limitations the blockade has neither meaning nor value. If it is maintained with regard to third states, it injures their rights and legitimate interests. * * *

[1] Science of Int. Law, p. 157.

"Sec. 993. For powers of the first rank, the pacific blockade constitutes a means, little burdensome, therefore more alluring, of making states of the second rank to submit to all kinds of vexations and annoyances. At bottom it is simply an act of war, a fact of hostility. In resorting to pacific blockade, the powers do not endeavor to escape war itself, but only the inconveniences and main obligations which war brings. It is considerations of interest, and not considerations of humanity, which urge maritime powers to resort to this means of constraint, which causes great losses to commerce in general."

Résumé.—It would seem from the weight of authorities and from the majority of later cases, that pacific blockades should not bear upon third states except as they are affected by the constraint directly applied to the state blockaded, i. e., the vessels of a third state should be entirely free to go and come while such measures of constraint as may be decided upon may be applied to the blockaded state.

If the need for interruption of relations between the blockaded state and third states is sufficiently serious to require the seizure of neutral vessels, it would seem to warrant the institution of a regular blockade involving a state of war.

If only the mild constraint which is short of war, the blockade affecting merely the blockaded state's commerce, is necessary, then pacific blockade, though it works inconvenience, may be legitimate.

Snow's International Law,[1] Manual Naval War College, says, after citing instances:

"It can thus be seen that without admitting the pacific blockade to be an established legal means of restraint or reprisal short of war, still the general tendency of writers, and more particularly of the great maritime states, is to favor its exercise, and while it may be desirable that other powers than those concerned should not be involved, still a blockade not applying to all maritime powers would not, as a rule, be effective or secure the results for which it was instituted."

[1] P. 74.

The blockade of Crete, 1897.—The official relations of the United States to the blockade of Crete in 1897 can be seen from the following communications.[1]

[Mr. Carter to Mr. Sherman. Telegram.]

EMBASSY OF THE UNITED STATES,
London, March 21 (?), 1897.

Officially notified blockade of Crete by powers March 21.

CARTER.

[Mr. Carter to Mr. Sherman.]

No. 887. EMBASSY OF THE UNITED STATES,
London, March 21, 1897.

SIR: I have the honor to inclose herewith a copy of my telegram, sent from this embassy to-day, together with a copy of a note received from the foreign office under date of March 20, 1897, announcing the intended establishment on the 21st of March of a blockade of the island of Crete by the combined British, Austro-Hungarian, French, German, Italian, and Russian naval forces, and transmitting three copies of notifications inserted in a supplement to the London Gazette of the 19th instant, two of which I have also the honor to inclose herewith, in order that they may become known to the citizens of the United States.

I have duly acknowledged the reception of the note above mentioned, and have informed Lord Salisbury that a copy thereof had been forwarded to my Government.

I have the honor, etc.,

JOHN RUDGELY CARTER.

(Inclosure in No. 887.) [Mr. Villiers to Mr. Carter.]

FOREIGN OFFICE, *March 20, 1897.*

SIR: I have the honor to transmit to you three copies of notifications inserted in a supplement to the London Gazette, of the 19th instant, announcing the intended establishment on the 21st March of a blockade of the island of Crete by the combined British, Austro-Hungarian, French, German, Italian, and Russian forces.

[1] For. Rel. U. S., 1897, pp. 253–255.

I request that you will have the goodness to transmit copies of these notifications to your Government, in order that they may, through that channel, become known to the citizens of the United States.

I have the honor, etc.,

F. H. VILLIERS.

(*In the absence of the Marquis of Salisbury.*)

(Subinclosure in No. 887.—From the Supplement to the London Gazette of Friday, March 19, 1897.)

FOREIGN OFFICE, *March 19, 1897.*

It is hereby notified that the Marquis of Salisbury, K. G., Her Majesty's principal secretary of state for foreign affairs, has received a telegraphic dispatch from Rear Admiral Harris, commanding Her Majesty's naval forces in Cretan waters, addressed to lords commissioners of the admiralty, and dated the 18th of March, announcing that the admirals in command of the British, Austro-Hungarian, French, German, Italian, and Russian naval forces have decided to put the island of Crete in a state of blockade, commencing the 21st of March, 8 a. m.

The blockade will be general for all ships under the Greek flag.

Ships of the six powers, or neutral powers, may enter into the ports occupied by the powers and land their merchandise, but only if it is not for the Greek troops or the interior of the island. These ships may be visited by the ships of the international fleets.

The limits of the blockade are comprised between 23° 24′ and 26° 30′ east of Greenwich, and 35° 48′ and 34° 45′ north latitude.

[Sir Julian Pauncefote to Mr. Sherman.]

BRITISH EMBASSY,

Washington, March 24, 1897.

SIR: On behalf of my government and at the request of my colleagues, the representatives of Austria-Hungary, France, Germany, Italy, and Russia, I have the honor to transmit the inclosed communication relative to certain measures taken by the naval forces of the great powers, signatories of the treaty of Berlin, in the waters of the island of Crete.

I desire to explain that this communication has not been delivered on the date which it bears, owing to an accidental delay in the receipt of their instructions by some of my colleagues.

I avail myself, etc.,

JULIAN PAUNCEFOTE.

[Inclosure.]

WASHINGTON, *March 20, 1897.*

The undersigned, under instructions from their respective governments, have the honor to notify the Government of the United States that the admirals in command of the forces of Austria-Hungary, France, Germany, Great Britain, Italy, and Russia, in Cretan waters, have decided to put the island of Crete in a state of blockade, commencing the 21st instant at 8 a. m.

The blockade will be general for all ships under the Greek flag. Ships of the six powers or neutral powers may enter into the ports occupied by the powers and land their merchandise, but only if it is not for the Greek troops or the interior of the island. The ships may be visited by the ships of the international fleets.

The limits of the blockade are comprised between 23° 24′ and 26° 30′ longitude east of Greenwich, and 35° 48′ and 34° 45′ north latitude.

JULIAN PAUNCEFOTE,
H. B. M. Ambassador.

PATENOTRE,
Ambassadeur de la Republique Francaise.

FAVA,
Ambassiatore d' Italia.

THIELMANN, ETC.

VON HENGELMULLER, ETC.

KOTZSBUE, ETC.

[Mr. Sherman to Sir Julian Pauncefote.]

623. DEPARTMENT OF STATE,
Washington, March 26, 1897.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 24th instant, transmitting to

me a communication under date of March 20, 1897, signed by yourself and the representatives of France, Italy, Germany, Austria-Hungary, and Russia at this capital, relative to certain measures taken by the naval forces of the great powers, signatories of the treaty of Berlin, in the waters of the island of Crete.

As the United States is not a signatory of the treaty of Berlin, nor otherwise amenable to the engagements thereof, I confine myself to taking note of the communication, not conceding the right to make such a blockade as referred to in your communication, and reserving the consideration of all international rights and of any question which may in any way affect the commerce or interests of the United States.

I have, etc., JOHN SHERMAN.

RAISING OF BLOCKADE OF CRETE.[1]

[Sir Julian Pauncefote to Mr. Hay.]

BRITISH EMBASSY,
Washington, December 13, 1898.

SIR: On behalf and at the request of my colleagues, the representatives of France, Italy, and Russia, as well as on behalf of my government, I have the honor to transmit to you for the information of your government the inclosed communication relative to the raising of the blockade in Cretan waters, the institution of which I had the honor to notify to Mr. Sherman on March 24, last year.

I have, etc., JULIAN PAUNCEFOTE.

[Inclosure in British note of December 13, 1898.]

WASHINGTON, *December 13, 1898.*

We, the undersigned, representatives of France, Great Britain, Italy, and Russia, have the honor to inform the Government of the United States that the admirals of the four powers in Cretan waters have issued a notice that the blockade of Crete has been raised from the 5th

[1] For. Rel. U. S., 1898, p. 384.

of December instant, but that the importation of arms and munitions of war is absolutely prohibited.

JULIAN PAUNCEFOTE,
H. B. M. Ambassador.
COUNT CASSINI,
Ambassador of Russia.
THIEBAUT,
Charge d'Affaires de France.
G. C. VINCI,
Charge d'Affaires d'Italie.

The blockade of Crete was, in a way, a police measure in accord with the provisions of the treaty of Berlin. It could properly effect the parties to it, but it has been held that it should not reach to neutrals.

In offering an opinion upon certain questions concerning pacific blockade, having in mind the action in Crete in 1897, Sir Walter Phillimore[1] said: "I am also of the opinion that, from the point of view of international law, it would be a misconception of the rules to seize a private vessel bearing the flag of a nation having no active or passive part in the so-called pacific blockade—bearing, for instance, the American or Dutch flag.

The right of blockade, of which the character is very burdensome for neutrals, is exclusively a right of war."

Mr. Lawrence, reviewing this blockade of Crete in 1897, says: "In 1896 the Christians of Crete rose in insurrection against Turkish misrule, and in February, 1897, proclaimed the union of the island with the Greek Kingdom. The great powers of Europe were determined not to allow the reopening of the dangerous Eastern question. They, therefore, forbade the incorporation of Crete with Greece; while, at the same time, they endeavored to bring about such changes in the government as would put an end to the worst evils and satisfy to some extent the aspirations of the Cretan Christians. But the Greeks and the islanders were determined upon union. A force of Greek regular soldiers under Colonel Vasso, was landed in Crete, and Greek volunteers, in considerable numbers, went to the aid of the insurgents. The powers

[1] Jour. du Droit Int. Priv., 24, p. 518.

in return sent a mixed force to occupy the Cretan ports, and instituted by means of an international squadron what was termed a pacific blockade of the island. It commenced on March 21, 1897, and was general so far as Greek vessels were concerned. Other ships were allowed to come into the ports occupied by the powers and disembark their merchandise, provided that it was not destined for the Greek troops or the interior, where the insurgents held out among the mountains. Thus the vessels of powers not concerned in the dispute were interfered with in certain circumstances. The area of their trade was arbitrarily circumscribed in time of peace for the attainment of ends with which they had no concern. The object of the powers was doubtless excellent. They were doing the police work of eastern Europe; but they did it in such a clumsy fashion that they violated the law of pacific blockade which had just emerged from chaos (see sec. 159) mainly through their own proceedings in the similar case of Greece, little more than ten years before. Then the blockade had been directed against Greek ships alone. Why was it now extended to non-Greek vessels? Doubtless, the extension helped to prevent supplies from reaching the insurgents; but the prolongation of the insurrection was largely due to the inability of the European concert to agree upon any acceptable settlement, such as was arrived at in the following year, when, after the withdrawal of Germany and Austria from the concert, autonomous constitution was given to the island, and Prince George of Greece was made high commissioner under the suzerainty of the Sultan. The delay of the powers to act quickly and reasonably in the political sphere led them to resort to acts in the military sphere, which were not the less objectionable because none of those who suffered protested against them. Their action has been defended on the grounds that they were in some sort agents of the Sultan (whom all the time they were coercing), and that as the police force of Europe they were at liberty to act as they pleased. The first reason is amusing, the second dangerous. Those who claim to make and execute the law should be specially careful to observe it. The result

of the action of the great powers in Crete is, that the nascent law of pacific blockade has gone back into the region of doubt and uncertainty."[1]

Franco-Chinese operations, 1884.—At the time of the Franco-Chinese difficulty in 1884, Minister Young wrote to Secretary Frelinghuysen under date of September 16, 1884, from Peking:[2]

"SIR: There has been much discussion in our diplomatic body as to the rights and duties of neutrals during the present complications between China and France. In my dispatch, No. 505, dated September 7, I inclosed a decree from the throne which appeared in the Peking Gazette August 27. 'In spite of our desire not to disturb the tranquillity, the pacific relations between France and us have been broken by the affair at Annam in regard to the matter of indemnity.' Under ordinary circumstances such a proclamation would be regarded as indicative of the actual existence of war, and could impose upon us the duties of neutrals.

"It has been impossible to obtain from the prince, with whom I have had several conversations, any declaration to the effect that China regards herself at war with France. I have asked for an official copy of the decree, but the answer is that decrees from the throne are domestic incidents and do not concern legations.

"I learn, furthermore, that M. Jules Ferry has said to European governments that France does not regard herself as at war with China. A proclamation issued by M. Lemaire, consul general of France at Shanghai, confirms this belief. At the same time the French at Kealing forcibly prevent a German ship from landing cargo, and the captain, in doing so, avers that he commits a 'belligerent act.'

"The question has assumed practical shape in various instances. The consul general and the consul at Tientsin have been asked whether American ships could carry munitions of war for Chinese. I have informed them that until war is declared our vessels are at liberty to carry any lawful merchandise. The consul at Foochow writes that he had forbidden American pilots to

[1] Int. Law, 2d ed., p. 670. [2] For. Rel. 1884, p. 103.

serve on French ships. I have said to him that until we know war exists, American pilots are free to accept any engagements."

The various representatives generally took the position that until either China or France made it officially known that there was war, they would assume none of the duties of neutrality, as Mr. Young said, "I see no reason for imposing the obligations of neutrality upon our people until we know war exists." With this position the English, Japanese, and Russian representatives agreed.

Although it was held by some that *de facto* war existed, no state actually proclaimed neutrality. Great Britain put into operation her foreign enlistment act as a domestic measure, and France agreed not to exercise full belligerent acts in way of search and seizure.

The letter of Lord Granville to M. Waddington[1] said that Great Britain would put in operation the foreign enlistment act merely if France limited its operations to certain regions, and if France would refrain from the exercise of belligerent rights as regards neutral vessels in the high seas.

The blockade of Formosa was announced October 20, 1884, to be effective from October 23. The proclamation allowed three days for friendly vessels to depart and announced that it would be effective against all vessels conformably to the international law and treaties in force.

In a letter of November 11, 1884, the English minister said that the pretention of the French Government, that a pacific blockade conferred on the power which established it the right to seize and condemn ships of a third power for violation of a blockade, is in opposition to the opinion of the most eminent statesmen and jurists of France, to the decisions of the courts, and to the well-established principles of international law. Further, he says the condition then prevailing was a state of war between France and China.

[1] Blue Book, France, I, 1885, p. 3.

China on August 27, 1884, issued the following to the foreign representatives:

"The French fleet has commenced hostilities at Foochow. The duty of neutral powers being to maintain neutrality in accord with the law of nations, we respectfully request you to give stringent orders to your citizens that they refrain from furnishing coal to French vessels."

They also request that no cipher dispatches be transmitted for France, and of Japan that no sales of horses be made.

The ministers of the United States, England, and Russia saw no reason to act in regard to coal and messages if war did not exist.

France, on the other hand, wished to consider rice contraband and coal free, the last on the ground that war was not declared.[1]

Whatever may be maintained in regard to pacific blockade, this was certainly war with an attempt to qualify it in area and range of operations.

The attempt of France was to establish a war blockade while assuming only the consequences of a pacific blockade.

Conclusions.—(*a*) The commander of the United States vessel of war should in no way recognize the right of the powers to institute such a pacific blockade affecting the United States.

(*b*) The commander should in no way acknowledge the right of the powers to enforce such a blockade against neutral commerce.

He would be under obligations to maintain this posisition by the action of Secretary Sherman, who replied to the proclamation of the pacific blockade:

"I confine myself to taking note of the communication, not conceding the right to make such a blockade as that referred to in your communication, and reserving the consideration of all international rights and of any question which may affect the commerce or interests of the United States."

[1] Livre Jaune, Chine, 1885, p. 16.

(*c*) The commander should request of the commander of the blockading forces that the merchant vessel of the United States be allowed to enter port K. If the request is denied he should make a protest, informing the commander of the blockading forces that the United States does not acknowledge the right of a force instituting a pacific blockade to interrupt the commerce of third powers not concerned, and that for damages the blockading states would be held responsible.

(*d*) And further, that in no case would the United States admit that a vessel entering port K would be liable to the severe penalties of violation of blockade.

The United States commander could maintain the above positions on the ground that the authorities and practice alike justified his contention, and that it is now the general opinion—

(1) That pacific blockade should be exclusively confined to those who are parties to it and should not be extended to third states.

(2) That pacific blockade as a measure short of war does not involve any neutrality on the part of those not parties to it.

(3) That pacific blockade should be limited as far as possible that it may not be confused with belligerent blockade, which is definitely outlined.

SITUATION VIII.

States X and Y are at war. A port of X is duly declared under siege by the land forces of Y and all communication with the port is declared closed, and all communication except by sea is cut off. Y is not maintaining an effective blockade of the port. A United States merchant vessel carries in flour for the use of the citizens and sells it at the port, when departing is seen just at the entrance of the port by a cruiser of Y, chased into the open sea, and there seized.

The captain of the merchant vessel, when brought into port, requests the assistance of the commander of a war vessel of the United States in obtaining his release, referring to a telegram of the Navy Department in the Spanish war which contained among other items: "Neutrals have a right to trade with ports not proclaimed blockaded."

What action should the commander take, and why?

SOLUTION.

The commander of a United States war vessel should inform the captain of the merchant vessel that the state of actually existing siege of the port made the act of carrying supplies to the port of Y one which constituted a departure from neutral duty and rendered the merchant vessel liable to penalty.

He could assure the captain that he would endeavor to make sure that he should have a fair trial.

NOTES ON SITUATION VIII.

THE EFFECT OF A SIEGE ON MARITIME COMMERCE.

The Telegram.—The portion of the telegram to which reference is made is upon page 298 of Naval Operations of the War with Spain, and is as follows:

WASHINGTON, D. C., *August 10, 1898.*

HOWELL, *Naval Base, Key West, Fla.:*

Replying to the last three lines of your telegram of the 8th instant, it is considered best for a few days not

to extend blockade beyond what has already been proclaimed. Beyond these limits be very careful not to seize vessels, unless Spanish or carrying contraband of war, as neutrals have right to trade with ports not proclaimed blockaded.

ALLEN, *Acting Secretary.*

This telegram was not intended to enunciate a general principle but merely to give instructions on a particular case which arose under order to "station between Port Nipe and Nuevitas sufficient force to prevent any expedition reaching Holguin between these two points, and make other disposition of the force under your command that will blockade north coast of Cuba as far as it is possible to do so with the force under your command." This telegram, as is shown in the full report, was not intended to apply to a state of siege, but merely to ordinary blockade of the coast.

In the "Situation" under consideration a siege is duly proclaimed and maintained by the forces of state Y. This siege is so effective that all communication with the port of state X, except by sea, is cut off. Under such circumstances it is held that the actions of neutrals are judged by the laws of siege rather than the laws of blockade.

The nature of a siege.—The laying of a siege is a hostile act effecting directly the population of the place besieged. It is a portion of the military operations intended to reduce the enemy to submission by cutting off all communication other than that specifically allowed to the besieged or that allowed by custom, e. g., communication by diplomatic agents with their own country.

The act of the neutral vessel bringing flour is an act that would directly tend to prolong the siege and make the achievement of the military end more difficult.

This is not simply an ordinary act of commerce.

"As a general principle, subjects of a neutral state may carry on commerce in the time of war as in the time of peace. At the same time, owing to the fact of war, a belligerent has the right to take measures to reduce his opponent to subjection. The general right of the neutral and the special right of the belligerent come into

opposition. The problem becomes one of 'taking into consideration the respective rights of the belligerents and of the neutrals; rights of the belligerents to place their opponent beyond the power of resistance, but respecting the liberty and independence of the neutral in doing this; rights of the neutral to maintain with each of the belligerents free commercial relations, without injury to the opponent of either.'"[1]

Grotius[2] says, in speaking of what we call conditional contraband in such cases:

"The state of the war is to be considered. For if I can not defend myself except by intercepting what is sent, necessity, as elsewhere explained, gives us a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. If the supplies sent impede the exaction of my rights, and if he who sends them may know this—as if I were besieging a town, or blockading a port, and if surrender or peace were expected—he will be bound to me for damages, as a person would who liberates a debtor from prison, or assists his flight to my injury; and to the extent of the damage, his property may be taken and ownership thereof be assumed for the sake of recovering my debt. If he has not yet caused damage, but has tried to cause it, I shall have a right by the retention of his property to compel him to give security for the future, by hostages, pledges, or in some other way."

Bynkershoek,[3] while maintaining the position of Grotius, is more explicit in making a general denial of approach to assist in any way a besieged place.

Vattel[4] says:

"All commerce with a besieged town is absolutely prohibited. If I lay siege to a place, or even simply blockade it, I have a right to hinder anyone from entering, and to treat as an enemy whoever attempts to enter the place to carry anything to the besieged without my

[1] Wilson & Tucker, Int. Law, p. 299, sec. 130.
[2] De Jure Belli ac Pacis, lib. III, cap. I, Sec. 5, 3 Whewell's ed.
[3] Quaestionum Juris Publici, Lib. I, Cap. IV et XI.
[4] Law of Nations, Bk. III, sec. 117.

leave; for he opposes my undertaking, and may contribute to the miscarriage of it, and thus involve me in all the misfortunes of an unsuccessful war."

Duer[1] maintains that, in general, the purpose of a blockade is to reduce the enemy by intercepting commerce, implying no act of direct hostility against the inhabitants of the place itself for the purpose of compelling surrender. The object of the siege, on the other hand, is to compel the place to capitulate or to reduce it by such means as may be within the power of the besiegers. The purpose is to use force to attain the object.

"It does not follow from this rule (in regard to effects of commercial blockade) that, when a port is besieged by land but not blockaded by sea, the trade might be lawfully carried on by sea. This would be an infringement on the belligerent's right of siege. The primary object of a siege being the reduction of the besieged place, all communication of neutrals with such a place, whether by water or by land, is a violation of neutrality."[2]

"The aim of a siege is the capture of a strong place or town beset. The aim of a blockade is to put stress on the population of a port or on the population behind it through denying it communication, commercial or otherwise, with the rest of the world accessible to it only by sea."[3]

"The general right possessed by a belligerent of restraining commercial acts done by private persons, which materially obstruct the conduct of hostilities, gives rise to several distinct groups of usage corresponding to different commercial relations between neutrals and the other belligerents.

"All trade divides itself into two great heads. It consists either in the purchase or sale of goods, or in carrying them for hire from one place to another. The purchase of goods by a neutral is the subject of no belligerent restriction. The general principle that a neutral has a right to trade with his belligerent friend necessarily covers a commerce by which the war can in

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[1] On Insurance, I, lect. 7, sec. 32.

[2] Ferguson, Manual of Int. Law, II, p. 480, secs. 271, 272.

[3] Maine, Int. Law, p. 108.

no case be directly affected. The belligerent gains nothing else than his mercantile profit, and to forbid such trade would therefore be to forbid all trade. But by the sale of goods the neutral may provide his customer with articles which, either by their own nature or from some peculiar need on the part of the belligerent, may be of special use in the conduct of hostilities. These, therefore, the enemy of the latter may intercept on their road after leaving neutral soil, and before sale to a belligerent purchaser has transformed them into goods liable to seizure as enemy property. Again, under the second head, a neutral may send articles innocent in themselves for sale in places access to which the belligerent thinks it necessary for the successful issue of his war to forbid altogether, and which he is allowed to bar by so placing an armed force as to make the approach dangerous; or the neutral may employ his ships in effecting a transport illicit because of the character of the merchandise or of the place to which it is taken; or finally he may associate his property with that of the belligerent in such manner as to show the existence of a community of interest, or an intention of using his neutral character to protect his friend. The effect of the various acts which fall under these heads differs with the degree of noxiousness which is attributed to them; but in all cases, as the possession of a right carries with it the further right to use the means necessary for its enforcement, the belligerent is allowed to inflict penalties of sufficient severity to be deterrent.

"The larger bodies of practice which have asserted themselves successfully with reference to these divisions may on the whole be explained by the more or less reasonable application of the principle that a belligerent has the right to carry on his operations without obstruction. It is easy to see the relation to this principle of the prohibition to carry goods the supply of which may increase the strength of a belligerent, and of that to carry any goods to besieged places."[1]

"The word blockade properly denotes obstructing the passage into or from a place on either element, but is

[1] Hall, Int. Law, 4th ed., p. 656, sec. 232.

more especially applied to naval forces preventing communication by water. Unlike siege, it implies no intention to get possession of the blockaded place. With blockades by land or ordinary sieges neutrals have usually little to do."[1]

"There is an important distinction between sieges and blockades. The former are, as a rule, undertaken with the object of capturing the place besieged, while the usual object of the latter is to cripple the resources of the enemy by intercepting his commerce with neutral states."[2]

Halleck[3] treats the matter of sieges very fully; reviewing earlier writers he says:

"Grotius considers the carrying of supplies to a besieged town or a blockaded port as an offense exceedingly aggravated and injurious; both agree that a neutral so offending may be severely dealt with; Vattel says that he may be treated as a public enemy. The views of these distinguished founders of international law are fully concurred in by the opinions of modern publicists, and by the prize courts of all countries. The right of a belligerent to invest the places and ports of an enemy so as to entirely exclude the commerce (otherwise lawful) of neutrals during the continuance of the investment, to prevent exports as well as imports, and to cut off all communication of commerce with the blockaded place, is undoubted, and, however serious the grievance, it is one to which neutral governments and their subjects are bound to submit. But as this right of the belligerent is an exception to the general rights of neutrals, and bears with great severity upon their interests, its exercise is always watched with peculiar jealousy, in order to prevent its necessary evils from being aggravated by a lax construction of the laws which regulate its application. * * *

"A *siege* is a military investment of a place, so as to intercept, or render dangerous, all communications between the occupants and persons outside of the besieging army; and the place is said to be *blockaded* when

[1] Woolsey, Int. Law, sec. 202. [2] Boyd's Wheaton, sec. 510*b*.
[3] Int. Law, 3d ed., Baker II, Chap. XXV.

such communication, *by water*, is either entirely cut off or rendered dangerous by the presence of the blockading squadron. A place may be both besieged and blockaded at the same time, or its communications by water may be intercepted, while those by land may be left open, and *vice versa*. Both are instituted by the rights of war, and for the purpose of injuring the enemy, and both impose upon neutrals the duty of not interfering with the operations of the belligerents. But there is an important distinction, with respect to neutral commerce, between a maritime blockade and military siege. The object of a blockade is solely to distress the enemy, intercepting his commerce with neutral states. It does not, generally, look to the surrender or reduction of the blockaded port, nor does it necessarily imply the commission of hostilities against the inhabitants of the place. The object of a military siege is, on the other hand, to reduce the place by capitulation, or otherwise, into the possession of the besiegers. It is by the direct application of force that this object is sought to be attained, and it is only by forcible resistance that it can be defeated. Hence, every besieged place is, for the time, a military post; for even when it is not defended by the military garrison, its inhabitants are converted into soldiers by the necessity of self-defense. This distinction is not merely nominal, but, as will be shown hereafter, leads to important consequences in determining the rights of neutral commerce and in deciding questions of capture.

"It might be inferred by parity of reasoning that, when a port is under a military siege, neutral commerce might still be lawfully carried on by sea, through channels of communication which could not be obstructed by the forces of the besieging army. But such inference would not be strictly correct, for the difference between a blockade and a siege, in their character and object, have led to a difference in the rules applicable, in the two cases, to neutral commerce. Although the legal effects of a siege on land that is purely a military investment of a naval or commercial port may not be an entire prohibition of neutral commerce, yet it does not leave the ordinary communications by sea open

and unrestricted, as a purely maritime blockade leaves the interior communications by land. The primary object of a blockade is, as we have already said, to prohibit commerce; but the primary object of a siege is the reduction of the place. All writers on international law impose upon neutrals the duty of not interfering with this object. To supply the inhabitants of the place besieged with anything required for immediate use, such as provisions and clothing, might be giving them aid to prolong their resistance. It is, therefore, a clear departure from neutral duty to furnish supplies, even of possible utility, to a port in a state of siege, although communication by sea may be open. It would be a direct interference in the war, tending to the relief of one belligerent and to the prejudice of the other; and such supplies are justly deemed contraband of war, to the same extent as if destined to the immediate use of the army or navy of the enemy. Hence, although the prohibition of neutral commerce with a port besieged be not entire, yet it will extend to all supplies of even possible utility in prolonging the siege."

Conclusion.—It will be seen that the international law makes a vessel liable to punishment when aiding a besieged place by useful supplies. Such action is regarded as "a clear departure from neutral duty." The action of the United States merchant vessel in carrying flour for the use of the citizens of the besieged place is clearly an act which is a "departure from neutral duty."

As, by the statement, the chase began at the entrance to the port and continued into the open sea, the vessel being guilty, capture was legal as a case of continuous pursuit begun within the jurisdiction of the pursuing party though continued on the high seas. The cruiser of state Y had full right to seize a guilty merchant vessel of the United States under the conditions given.

The reference of the captain of the merchant vessel was to a telegram referring only to a state of blockade, when it is true that "neutrals have right to trade with ports not proclaimed blockaded." This telegram is therefore not applicable to the case under consideration.

The commander of the United States war vessel should therefore inform the captain of the merchant vessel that the state of siege of the port of Y made the act of carrying supplies to the port of Y one which was a departure from neutral duty and one which rendered the merchant vessel liable to capture under the circumstances.

He might assure the captain that he would endeavor to see that a fair trial should be given him.